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IN THE

Supreme Court of the United States

October Term, 1957.

No. 309

J. MINOR SULLIVAN, III,

Petitioner,

v.

STATE OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

WILLIAM T. COLEMAN, JR.,
2635 Fidelity-Philadelphia Trust Building,
Philadelphia 9, Pa.,

RAYMOND PACE ALEXANDER,
40 South 19th Street,
Philadelphia, Pa.,
Attorneys for Petitioner.

DILWORTH, PAXSON, KALISH & GREEN,
2635 Fidelity-Philadelphia Trust Bldg.,
Philadelphia 9, Pa.,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered on April 1, 1957, by a 4 to 3 vote, with rehearing denied on May 6, 1957.

Opinions Below.

The majority and dissenting opinions of the Supreme Court of New Jersey are reported at 24 N. J. 18, 130 A. 2d 610 (1957) (Appendix B, *infra*, pp. 11b-59b). The special findings of the trial judge are not reported (Appendix B, *infra*, pp. 1b-10b).

Jurisdiction.

The opinion of the Supreme Court of New Jersey was filed on April 1, 1957. A timely petition for rehearing, filed April 10, 1957, was denied by the Supreme Court of New Jersey on May 6, 1957 (Appendix B, *infra*, p. 61b). See

Gypsy Oil Co. v. Escoe, 275 U. S. 498, 499; *Nebraska v. Pink*, 317 U. S. 264, 266; *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144, 149, n. 7. Jurisdiction of this Court is invoked under Title 28 U. S. C. § 1257(3), petitioner having asserted in the state courts and having had denied him by those courts rights, privileges and immunities guaranteed him by the Constitution and laws of the United States.

How the Federal Questions Were Presented.

The judgment of the Supreme Court of New Jersey affirmed the conviction of petitioner on three of the seven counts for perjury on which the lower court had found him guilty. Petitioner attacked the indictment on the ground that it violated constitutional rights guaranteed him by the Fourteenth Amendment. See *State v. Sullivan*, 25 N. J. Super. Ct. 484, 96 A. 2d 680 (App. Div., 1953), *certification denied*, 13 N. J. 289, 99 A. 2d 450 (1953), *cert. denied*, 347 U. S. 903 (1954). At every stage of the trial he urged both the application of the "two-witness rule" in perjury cases, and also that the evidence would not justify a conviction under the rule.[1] He assigned the error to apply the two-witness rule on appeal to the Supreme Court of New Jersey.

In the trial court petitioner objected to substantial prejudicial errors in the conduct of the trial, including: introduction of the press statement he had made (162a-168a *), (Appendix B, *infra*, p. 32b); admission of the result of the second Trenton Six case (34a-36a), (Appendix B, *infra*, pp. 26b, 32b); exclusion of medical text books of-

1. The "two-witness" rule in perjury cases provides, of course, that before there may be a conviction for perjury, there must be testimony by two witnesses or testimony by one witness plus "strong corroborative evidence" to the facts which establish the falsity of the alleged perjurious statements. *Weiler v. United States*, 323 U. S. 606. In this Petition, the "two-witness" rule refers to both facets of the rule.

* These references are to the Appendix of the Record before the Supreme Court of New Jersey, filed here as part of the Record certified by the Supreme Court of New Jersey.

fered by him (183a, 420a, 430a), (Appendix B, *infra*, p. 28b); the exclusion of Exhibits D-4 and D-5 (192a-193a), (Appendix B, *infra*, p. 29b); the prosecutor's argument that since he was a witness for the State it showed bad faith for him to respond to questions on cross-examination in a way favorable to the defense (454a).

The Supreme Court's ruling (Appendix B, *infra*, p. 23b), that petitioner's unlawful intent could be inferred from the fact that, as a State witness, his testimony on cross-examination favored the defense, of course, could not be raised until such ruling had been made. Likewise, with respect to Exhibits D-4 and D-5, the rulings complained of in this petition were raised in the Supreme Court only by the petition for rehearing, since it was the Supreme Court's ruling itself which constituted the lack of due process. See dissenting opinion of Justice Weintraub (Appendix B, *infra*, p. 56b); *Saunders v. Shaw*, 244 U. S. 317, 320.

How the Federal Questions Were Disposed of.

The Supreme Court of New Jersey affirmed the perjury conviction upon evidence which does not satisfy the two-witness rule.

It also held that the admission into evidence of the radio comment of petitioner on the outcome of the second trial of defendants in the *Trenton Six* case was not prejudicial; and that the exclusion of the medical text books was equally non-prejudicial. The Supreme Court also relied upon the fact that petitioner was a witness for the prosecution in the *Trenton Six* case as some evidence that he gave untrue answers solely because on cross-examination some of his answers were favorable to the defense rather than the prosecution.

Despite the fact that the Supreme Court of New Jersey admitted that Exhibits D-4 and D-5 were relevant, it affirmed their exclusion, even though these exhibits were crucial to petitioner's defense. It did so on the basis of facts set forth for the first time on appeal in the brief of the

State. See dissenting opinion (Appendix B, *infra*, p. 56b). Since it was the State appellate court which denied petitioner due process he had no opportunity to assign this ground as error prior to petition for rehearing. See *Saunders v. Shaw, supra* at p. 320.

Questions Presented.

I. Whether the Federal Two-Witness Rule in Perjury Cases Is So Fundamental That Its Application in State Criminal Cases Is Required by the Fourteenth Amendment?

II. Whether Rights Guaranteed by the Fourteenth Amendment Are Violated When the State Appellate Court Sustains the Exclusion of Admittedly Relevant and Crucial Evidence on the Basis of Alleged Facts Found Solely in the State's Brief on Appeal? See *Saunders v. Shaw*, 244 U. S. 317.

III. Whether the Conduct of the Trial Was Such as to Constitute a Denial of a Fair Trial as Guaranteed by the Fourteenth Amendment?

Statement of the Case.

Petitioner, a Negro physician, stands convicted of three of eight counts of perjury which alleged that he knowingly gave false medical opinion testimony on cross-examination in the retrial of a murder case known as the *Trenton Six* case, which involved six Negroes accused of murder. The affirmance of the perjury conviction was by a 4 to 3 vote.

It was the State's contention that upon cross-examination on the second trial petitioner changed his testimony from that given by him during the first trial and that this later testimony was knowingly and wilfully false. A full understanding of the constitutional issues requires a statement of the background of the *Trenton Six* case.

On January 27, 1948, William Horner, a white man, was brutally murdered in Trenton, New Jersey. On

February 6, 1948, six Negroes, Ralph Cooper, Collis English, McKinley Forrest, John MacKenzie, James H. Thorpe and Horace Wilson were arrested. They were questioned in relays, held without representation and, according to their allegations, threatened. After four days of incarceration five of the six men admitted participation in the murder. Before written confessions were signed, petitioner and a Doctor Corio were called in by the prosecutor to examine the prisoners solely for (a) evidence of physical brutality [2] and (b) to see that no physical force was used at the time the confessions were signed (124a, 125a). This was the sole interest of the prosecutor as the decisions of this Court in 1948 would exclude confessions in state criminal trials only if obtained by physical force.

Petitioner thereupon questioned each defendant as to whether he had been threatened or suffered physical punishment. Each said he had not. At the time of the examination petitioner made notes indicating in addition the mental status of the accused; these notes were offered as Exhibit D-4 in the perjury case (192a-193a, 489a-491a). Two days later in his office petitioner made another memorandum of his findings; this memorandum was offered at the perjury trial as D-5 (192a-193a, 493a).[3] Later petitioner gave a sworn statement to the police on oral interrogation. (Appendix B, *infra*, p. 2b).

The six accused were brought to trial. The trial lasted 44 days. Petitioner testified for the State on direct examination as a pure fact witness with no reference to his

2. It is conceded by the State that petitioner found that English had a bad heart, that Thorpe had had one of his arms amputated about a week previous, there still being a slight seepage of blood from the stump. He also observed that Cooper's eyes were red in such a manner that it suggested the use of marijuana cigarettes.

3. These notes (Ex. D-4 and D-5) were available to the prosecution in the first murder trial, but were not produced as they were unfavorable to the prosecution (196a-199a, also Volume 3, p. 1163(a) of the Record in the first *Trenton Six* case filed with this Petition as part of the certified Record.) Petitioner being merely a witness obviously had no control over what documents the prosecution offered.

professional skill. On cross-examination the approach was essentially the same as upon direct except for the further development of some hypothetical testimony given on direct examination by petitioner, i.e., that he asked Cooper if he used "reefers" and that a drug could have produced the symptoms petitioner observed. The six accused were convicted and sentenced to die. These convictions were reversed by the Supreme Court of New Jersey. *State v. Cooper*, 2 N. J. 540, 67 A. 2d 298 (1949).

In the first trial the question of the forced confessions was limited solely to the physical treatment of the accused. In its opinion reviewing the convictions, however, the Supreme Court of New Jersey adverted to this Court's decision in *Watts v. Indiana*, 338 U. S. 49, handed down subsequent to the first trial, invalidating a confession produced by psychological coercion. As recognized by the court below, this Court's decision for the first time brought to the fore the problems of confessions obtained by psychological coercion (Appendix B, *infra*, p. 19b).

At the second trial petitioner gave the same testimony on direct examination as he had given upon his first trial. Over the State's objection, petitioner was then subjected to "fantastic cross-examination"; (Appendix B, *infra*, p. 43b) a direct examination of 15 printed pages was followed by 298 pages of further interrogation. Defense attorneys worked in relays upon petitioner, traversing the course time and again, and propounding one hypothesis upon another. For the first time in either of the two trials, petitioner was asked about the psychological or mental conditions of the six accused. These questions consisted mainly of his opinion as to whether, assuming the existence of certain physical facts, the accused might have a certain mental state. Petitioner's answers to these hypothetical questions are the basis of the perjury conviction. (Appendix B, *infra*, pp. 9b, 33b, 37b.)

At the second murder trial the jury acquitted four of the accused. The remaining two, English and Cooper, were

again convicted of murder in the first degree, but this time the jury recommended a life sentence. These two convictions were appealed to the Supreme Court of New Jersey and again reversed. *State v. Cooper*, 10 N. J. 532, 92 A. 2d 786 (1952). English died in prison of his heart condition before a third trial could take place. Cooper pleaded guilty to the indictment whereupon he was sentenced to the time already served in prison.

Attacked by the prosecutor as having "set sail on a course to free the murderers of William Horner" (447a), and as being responsible for the acquittal of the four (454a), petitioner was indicted on eight counts. After trial by the court without a jury, he was convicted on seven. The Supreme Court of New Jersey reversed as to all but three.

Two of the three counts which remain charge that petitioner perjured himself at the second trial in testifying concerning the mental state of English (who the State concedes had a "serious heart murmur") at the time he made his confession. In substance, these counts allege that petitioner lied when at the second trial he described English as a "little mumbly," a "little confused," "highly nervous," and in a psychoneurotic condition attributable to mental pressure as the result of his heart condition.[4]

The third count dealt with petitioner's testimony that MacKenzie was nervous and moderately excited, that he "appeared to be in a controlled state, as if having a drug" and that "I don't know of any other situation that might put a person in a controlled state other than the hypnosis."[5]

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4. It would seem clear that a serious heart condition would produce the symptoms petitioner testified to, as the text books petitioner sought to introduce, but which were excluded, show. Moreover, there is at least a reasonable presumption, that one who has confessed to murder is somewhat psychoneurotic. (Appendix B, *infra*, 48b.)

5. To convict anyone on the grounds that these observations were false, passes the realm of rationality. Any man arrested for murder, who, as the court below pointed out in the *Trenton Six* case, had just signed his death warrant, would "exhibit some nervousness and even

The evidence introduced by the State consisted of: the record of petitioner's testimony at the second trial of the *Trenton Six* case and, over petitioner's objection, the verdict in that case of not guilty as to four of the six accused (36a); the testimony of Dr. Corio that his examination of the accused was limited solely to their physical condition; the testimony of policemen as to the physical condition of the accused. In addition, the State introduced over petitioner's objection on the ground it was highly prejudicial, a recording of a radio statement which petitioner had made after the acquittal of four of the accused. This statement said that the acquittal had been a "great victory for American justice."[6]

Petitioner took the stand in his own defense and testified that the answers to the hypothetical questions he was asked at the second trial were based upon his medical training and knowledge. He offered to answer the accusation that he had changed his testimony between the first and second trials by offering Exhibits D-4 and D-5. These Exhibits show that within two days after his examination (and months before the first trial) he had recorded precisely the same psychological symptoms he is now accused of stating falsely.[7] This evidence was excluded by the trial judge. In addition, petitioner attempted to introduce medical text books which supported his medical opinion. These,

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fear." *State v. Cooper;* 10 N. J. 532, 92 A. 2d 786, 795 (1952). Indeed, the State concedes that MacKenzie's confession occurred following "a 'lapse of consciousness' following the smoking of cigarettes provided by a turnkey." *State v. Cooper*, 2 N. J. 540, 557, 67 A. 2d 298, 306 (1949).

6. The entire statement was:

> "I must say I am very, very happy. This has been a great victory for American justice. We are all so excited and so greatly enthused over the victory that was won by American justice we hardly know what to say. The community, the judges, the police and everyone that had a part in it has played it to the best of their ability. We feel this has been a great victory for American justice." (171a)

7. They are reproduced in the Record at pp. 489a-493a.

too, were excluded by the trial judge. Petitioner also attempted to introduce the record of the testimony of one Manning and Police Captain Delate, witnesses for the State, who also had testified at the first trial that English was "highly nervous". (437a-8a, 427a-435a) (Appendix A, *infra*, pp. 45b, 28b).

In affirming three of the perjury counts of the seven on which the trial court had convicted petitioner, the Supreme Court of New Jersey admitted that Exhibits D-4 and D-5 were relevant evidence;[8] but justified their exclusion on the theory—not relied upon in any way by the court below, nor supported by one word in record—that Exhibits D-4 and D-5 were not genuine. In fact, until the filing of the State's brief in the Supreme Court, everyone, prosecution, defense and court alike, had conceded that the documents were genuine. The Supreme Court also held that the medical books were relevant and should have been admitted, but that the exclusion was not prejudicial. In addition, it found proof of perjury in the fact that, although petitioner was called by the State, some of his answers given on cross-examination were favorable to the accused (Appendix B, *infra*, p. 23b).

The court below also found perjurious intent in the fact that petitioner was willing to give his medical opinion even though the trial judge had stated that he could hide behind the fact that he had not qualified as a psychiatrist (Appendix B, *infra*, p. 19b).

The conviction was affirmed on three counts by a 4 to 3 vote. The dissenting opinion pointed out the denial of due process to petitioner by the majority's rulings and decisions. A timely petition for rehearing was denied.

It is relevant to state that not only has petitioner been sentenced to pay a fine of $1,500 and given a two year suspended sentence, but also petitioner, a respected physician,

8. In the opinion of the three dissenting Justices, these documents were a complete defense to the indictments. (Appendix B, *infra*, p. 57b.)

has been branded with the criminal label of "perjurer." Further, the State has indicated that as soon as these proceedings are at an end it will attempt to have petitioner's license to practice medicine revoked.

Reasons for Allowance of the Writ.

Petitioner believes that the dissenting opinion in the court below states forcefully and fairly the procedural and substantive errors which resulted in his conviction for perjury. Petitioner doubts that there has been a case in which a physician has been convicted of perjury in circumstances like those presented by this record. Petitioner recognizes that in the normal course this Court does not grant its writ of certiorari to review the merits of a State criminal proceeding. Yet, the unfairness to petitioner and the implications of the decision of the court below are so egregious as to amount to a violation of his rights under the Fourteenth Amendment.

Petitioner's examination of the six accused was conducted some eight years before his perjury trial. His testimony on direct examination at the second trial—limited, of course, by the prosecutor's selection of the questions to be asked—was completely consistent with the testimony he gave at the first trial. It was only after an incredible cross-examination that qualifications to his original testimony were eked out. Indeed, it was not until the prosecution questioned him on re-direct that most of the allegedly perjurious statements were made.

In the opinion of the court below, a witness called by the State is subject to the gravest suspicion if his testimony is not absolutely pro-prosecution; the opinions of a medical expert are equally subject to the gravest suspicion if they do not accord with the prosecution's view—even though the expert's views are supported by medical text books.

It bears repeating that petitioner was not originally called to examine these men as an expert, nor was he called

upon to testify as one, rather he was a "fact" witness only; he was not and is not a psychiatrist who is qualified to testify as to the vagaries of human psychology.

If the majority opinion of the court below were to stand, the right of cross-examination has been seriously curtailed. And the right of petitioner to a fair trial has been forever lost.

1. It is a deep-rooted principle of our jurisprudence—Federal and State alike—that no person may be convicted of perjury unless there is corroboration in the way of two witnesses (or one witness plus strong corroboration) whose testimony establishes the facts relied upon to show the falsity of the alleged perjurious statement. The dissenting opinion of Justice Weintraub demonstrates beyond peradventure of doubt that if the conviction has to be measured by this rule, the evidence simply does not sustain it. (Appendix B, *infra*, pp. 34b-55b).

This case is quite analogous to *United States v. Remington*, 191 F. 2d 246 (2d Cir., 1951), where the failure of trial judge to specify what "overt acts" might amount to joining the Communist Party required reversal of conviction since only with such a specification could defendant enjoy the benefit of the corroboration rule. The majority opinion here does not point out which overt acts constitute the perjurious statement. There are, moreover, no facts established by two witnesses from which the court could infer petitioner's state of mind. See the analysis by Justice Weintraub (Appendix B, *infra*, pp. 34b-55b). See also, *Radomsky v. United States*, 180 F. 2d 781 (9th Cir., 1950); *Gold v. United States*, 237 F. 2d 764 (D. C. Cir., 1956), *reversed on other grounds*, U. S. .. (Jan. 28, 1957), 1 L. Ed. 2d 360.

This Court has held fast to such a requirement as a safeguard to a fair trial—it being the only guarantee whereby a defendant can obtain witnesses who will feel free to testify. *Weiler v. United States*, 323 U. S. 606. In that case it was pointed out (pp. 607-9) that the government

"must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances" and that "[this] special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries." In addition, this Court, in *Hammer v. United States*, 271 U. S. 620, stated that the application of such a rule "in Federal and state courts is well nigh universal." 271 U. S. 620, 626,[9] and see both state and federal cases cited at p. 626 n. 1. See the collection of state statutes, and cases, Appendix A, *infra*, p. 1a *et seq.* Since the time of Coke it has been the law of England and is now enacted into a statute. The Public General Statutes, London 1911, p. 20; Parliamentary Debates, Lords, Vol. VII; 1911, pp. 143-146. Thus, the requirements of the two-witness rule as applied by this Court in perjury cases is the "common understanding of those who have lived under the Anglo-American system of law [as shown] in the constitutional, legislative, and judicial history of the states to the present date." *Betts v. Brady*, 316 U. S. 455, 464-465; *Powell v. Alabama*, 287 U. S. 45.

Petitioner submits that this rule is so important a guarantee to a fair trial that it is fundamental to our concept of due process and, therefore, is imposed upon the States by the Fourteenth Amendment. Certainly, its universal acceptance by our federal and state courts bears testimony to this effect. See, *e.g.*, *In re Oliver*, 333 U. S. 257, 266-268; *Solesbee v. Balkcom*, 339 U. S. 9, 14 (dissenting opinion by Mr. Justice Frankfurter); see Kadish, *Due Process Adjudication*, 66 Yale L. J. 319, 327-332 (1957). It is as important a guarantee as the rule that a forced confession cannot be used, *Fikes v. Alabama*, 352 U. S. 191, or the rule that a prosecutor cannot knowingly use perjured testimony. *Mooney v. Holohan*, 294 U. S. 103.

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9. We do not have here a contention that the offense of which petitioner was convicted was something less than "perjury." The court below conceded that the "false statements" indictment had been abandoned. (Appendix B, *infra*, p. 15b.)

Accordingly, whether considered in the light of the unfairness to petitioner in this case or as a matter of constitutional precepts, the proper application of the two-witness rule is required by the Fourteenth Amendment. Because its application was here rejected, this Court should reverse petitioner's conviction.

2. Petitioner submits he was deprived of his constitutional rights to a fair trial (including the right to examine evidence used against him) when the Supreme Court of New Jersey denied him a new trial on the basis of the exclusion of Exhibits D-4 and D-5. The State's theory was that between the first and second trial petitioner changed his testimony and that he lied at the second trial about what he had observed when he examined the accused in 1948. Obviously a conclusive defense to this charge was a showing that contemporaneous with the examination of the accused in 1948, petitioner had written two memoranda which specifically record the same psychological symptoms which he is now accused of giving falsely and that he had shown them to the prosecution in 1948. The court below held that this evidence was relevant and, if genuine, should have been admitted (Appendix B, *infra*, pp. 29b-30b). However, based upon purported facts asserted for the first time in the State's Brief on appeal, it determined the documents to be false. Justice Weintraub's dissenting opinion cogently summarizes the denial of due process in such a procedure (Appendix B, *infra*, p. 56b).

> "First, it should be noted that the State did not make that objection below nor did the trial court so find, but rather the State urged that the memoranda could be used only to refresh recollection, and this was the sole ground of rejection. The contention that the memoranda are unreliable was made for the first time in the brief of the State before us. I know of no principle under which an appellate court can deny a rudiment of a trial, the right to examination under oath, on

the basis of factual assertions in a brief. I had thought that due process of law precluded that course."

This Court has held such procedures by a State appellate court to be violative of the Fourteenth Amendment even in a civil case, *Saunders v. Shaw*, 244 U. S. 317. That case involved an injunction against the collection of a drainage tax, in which the bondholders intervened in defense. The Supreme Court of Louisiana upheld the tax levy. On a petition for rehearing the plaintiff asserted in his brief that the land was low and marshy and had not been benefited by the present drainage system. The Supreme Court of Louisiana accepted these statements in the brief as facts and reversed. This Court in a unanimous opinion by Justice Holmes, held, however, that it violated constitutional rights guaranteed by the Fourteenth Amendment for the State appellate court to dispose of the litigation on facts which the losing party never had an opportunity to meet in the trial court.

This Court stated:

"The chief justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. Case that to remand it would be an empty form,—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

"The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ.

> Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." (pp. 319-320)

If, as this Court held, this procedure violates due process in a civil case, *a fortiori*, it violates due process in a criminal case when liberty is at stake.

It bears repeating that petitioner is not raising a simple question of evidence as, for example, whether something is within or without the hearsay rule. Instead he raises the fundamental question whether a State appellate court can, consistent with the due process clause of the Fourteenth Amendment, reject admittedly relevant and crucial evidence on the basis of purported facts, not in the Record, but asserted only in the State's brief on appeal. And, as stated above, petitioner's proof is overwhelming that the facts are not as assumed by the State Appellate Court (Appendix B, *infra*, pp. 56b-57b).

3. Petitioner urges that the burden imposed upon him was such as to make it impossible for him to have a fair trial. In the first place the State adopted the rule that where a witness is produced by the State his testimony becomes suspect if any of it is favorable to the defense. In addition, his testimony becomes suspect if he as a medical man thinks he is competent to give his opinion on psychological matters even though the judge has indicated that if he states he is not competent the cross-examination would be foreclosed. Moreover, petitioner stands convicted, in part at least, because he stated after the second trial that in his opinion the acquittal of four of the accused was a triumph of American justice. Finally, there would appear to be no better way of defending an accusation that

medical opinions are perjured than by pointing to text books by authorities in the field which have the same opinion, but this too was denied petitioner. The sum total of these prejudicial errors denied petitioner a fair trial, and, therefore, his conviction violates the Fourteenth Amendment. *Saunders v. Shaw, supra; Mooney v. Holohan, supra.*

Petitioner has been "branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 174, 180 (concurring opinion of Mr. Justice Douglas).

4. The questions submitted for review are of great general importance which it is in the public interest to have decided by this Court. Their importance to petitioner is obvious—he is now a convicted perjurer: his entire professional life, including his right to make a livelihood by use of the skill which took many years to acquire, is in grave jeopardy.

But petitioner also asserts constitutional rights of wide public significance. If his conviction is permitted to remain unreversed, the ability of defendants to have medical testimony to support their defenses—including, as here, contentions that confessions have been coerced—will be seriously and substantially impaired. The decision of the court below, indeed, encourages the making of perjurious statements. For once witnesses have taken positions on direct examination, they will be compelled—for fear of a prosecution for perjury—to adhere to them regardless of the truth of their answers on cross-examination. In addition, to strip petitioner of the protection of the two-witness rule is to deny the constitutional right of persons who attempt to upset allegedly forced confessions to have witnesses to testify freely without fear of undue harassment by a disappointed prosecution. The protection of this constitutional right becomes effective only if the witness accused of perjury can claim the protection of the two-witness

rule. *Cf. Barrows v. Jackson*, 346 U. S. 249; *Pierce v. Society of Sisters*, 268 U. S. 510, 534-535.

The guarantee of freedom from convictions by use of a false confession becomes empty if those who testify freely on behalf of the accused can be convicted of perjury for their medical opinions without the safeguard of the two-witnesses rule in perjury cases. The issue of a fair trial, presented by this record, is of recurring importance and is proper for this Court's review.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.,
RAYMOND PACE ALEXANDER,
Attorneys for Petitioner.

DILWORTH, PAXSON, KALISH & GREEN;
2635 Fidelity-Philadelphia Trust Building,
Philadelphia 9, Pa.
Of Counsel.

APPENDIX A.

State Cases and Statutes Requiring the Application of the Federal "Two-Witness Rule" for Convictions in Perjury Cases.

ALABAMA: *Dorch v. State*, 83 So. 2d 250 (Ala. 1955); ARIZONA: ARIZ. CODE ANN. § 44-1812, *State v. Betts*, 71 Ariz. 362, 227 P. 2d 749; ARKANSAS: *Stubblefield v. States*, 146 S. W. 2d 688 (Ark., 1941); CALIFORNIA: CAL. PENAL CODE § 1103a, *People v. Tolmachoff*, 138 P. 2d 61 (Calif., 1943); COLORADO: *People v. Anderson*, 187 P. 2d 934 (Colo., 1947); CONNECTICUT: *State v. Campbell*, 104 Atl. 653 (Conn., 1918); DELAWARE: *State v. Fahey*, 54 Atl. 690 (Dela. Gen. Sep. 1903); FLORIDA: *Keir v. State*, 11 So. 2d 886 (Fla., 1943); GEORGIA: GA. CODE § 38-121, *Potts v. State*, 78 Ga. App. 249, 52 S. E. 2d 575 (1949); ILLINOIS: *People v. Niles*, 295 Ill. 525, 129 N. E. 97 (1920); INDIANA: *Hann v. States*, 183 Ind. 56, 113 N. E. 304; IOWA: *See State v. Powers*, 30 N. W. 2d 476 (Iowa, 1948); KANSAS: *State v. Phillips*, 172 Kan. 505, 241 P. 2d 503 (1952); LOUISIANA: *State v. Jean*, 42 La. Ann. 946, 949, 8 So. 480 (1890); KENTUCKY: *Jewell v. Commonwealth*, 296 Ky. 718, 178 S. W. 2d 415 (1944); MAINE: *State v. Rogers*, 149 Me. 32, 98 A. 2d 655 (1953); MASSACHUSETTS: *Comm. v. Parker*, 2 Cush. 212 (1848), *Com. v. Butland*, 119 Mass. 317, 324; MICHIGAN: *People v. Kennedy*, 221 Mich. 1, 4, 190 N. W. 749; MINNESOTA: *State v. Storey*, 148 Minn. 398, 182 N. W. 613; MISSISSIPPI: *Clanton v. State*, 210 Miss. 700, 50 So. 2d 567 (1951); MISSOURI: *State v. Brinkley*, 189 S. W. 2d 314 (Mo., 1945); MONTANA: CODE OF CIVIL PROCEDURE § 616, *State v. Gibbs*, 10 Mont. 213, 25 Pac. 289 (1890); NEBRASKA: *Gandy v. State*, 27 Neb. 707, 734, 43 N. W. 747 (1888); NEVADA: *State v. Cerfoglio*, 46 Nev. 332, 340, 205 Pac. 791 (1922); NEW JERSEY: *State v. Lupton*, 102

N. J. L. 530, 130 Atl. 861 (1926); NEW MEXICO: *Territory v. Williams*, 9 N. M. 400, 54 Pac. 232 (1898); NEW YORK: *People v. Gleason*, 285 App. Div. 278, 136 N. Y. S. 2d 220 (1954); NORTH CAROLINA: GENERAL STATUTE § 14-209, *State v. Sailor*, 240 N. C. 113, 81 S. E. 2d 191 (1954); OHIO; OHIO GEN. CODE § 1344-22; OKLAHOMA: *Scott v. State*, 66 Okla. Crim. 441, 92 P. 2d 847 (1939); OREGON: HILL'S CODE § 778, *State v. Buckley*, 18 Or. 228, 22 Pac. 838 (1889); PENNSYLVANIA: *Commonwealth v. Schendler*, 170 Pa. Super. Ct. 337, 85 A. 2d 151 (1952), *Commonwealth v. Gore*, 171 Pa. Super. Ct. 8, 90 A. 2d 405 (1952); SOUTH CAROLINA: *State v. Crowley*, 85 S. E. 2d 714 (S. C., 1955); SOUTH DAKOTA: *State v. Pratt*, 21 S. D. 305, 311, 112 N. W. 152 (1907); TENNESSEE: *Hicks v. State*, 232 S. W. 2d 39 (Tenn., 1950); TEXAS: VERNON'S ANN. C. C. P. ART. 723; VERMONT: *State v. Woodley*, 109 Vt. 53, 192 Atl. 1 (1937); VIRGINIA: *Schwartz v. Commonwealth*, 27 Grat. 1025, 21 Am. Rep. 365; WASHINGTON: *State v. Rutledge*, 37 Wash. 523, 527, 79 Pac. 1123 (1905); WEST VIRGINIA: *State v. Miller*, 24 W. Va. 802 (1884). No reported cases have been found which consider the question in the following states: IDAHO, MARYLAND, NEW HAMPSHIRE, RHODE ISLAND, NORTH DAKOTA, UTAH, WISCONSIN, WYOMING.

APPENDIX B.

SPECIAL FINDINGS OF FACTS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY.

(Filed 3/26/56.)

MORRIS, *J. C. C.*

The Mercer County Grand Jury for the September Session of 1952, on December 23, 1952 returned an indictment against the defendant for perjury alleging that the said defendant did commit willful and corrupt perjury contrary to the provisions of R. S. 2:157-1. The January Session of the Mercer County Grand Jury returned an indictment against the said defendant on March 24, 1953 alleging that the defendant willfully did swear falsely under oath in a judicial proceeding contrary to the provisions of R. S. 2:157-4. On motion by the State the two indictments were consolidated, and tried by the court, the defendant having waived in writing his right to a trial by jury.

The indictments in question, each containing eight counts, specifically set forth in each count portions of the defendant's testimony at the second murder trial of Ralph Cooper, Collis English, McKinley Forrest, John MacKenzie, James Thorpe, and Horace Wilson. In the perjury indictment, the State alleges in eight separate instances the defendant knowingly, falsely, corruptly and willfully did say, depose, swear and give evidence, among other things, in substance to the effect that certain answers made by Dr. Sullivan to questions propounded at the second murder trial were false and untrue, whereas in truth and fact the defendant then and there well knew they were not true. The same allegations are made in the false swearing indictment, except that the State alleges that the defendant did willfully swear falsely in substance and effect knowing that same was not true in fact.

The State produced Mrs. Gladys Barry, official court reporter for Mercer County, and stated that it was prepared to have Mrs. Barry refer to the official stenographic record of the murder trial and read certain portions of the defendant's testimony. The court suggested that it would facilitate the trial and also be fairer to the defendant if all of his testimony was read to the court. It was my opinion that if the State offered only certain portions of the defendant's testimony from the record which the State thought was relevant, then the defendant would be entitled to have read into the record certain portions of the defendant's testimony that the State did not offer, but which the defendant thought to be relevant. In my opinion, this would have created a state of confusion.

In addition to other witnesses, the State produced Lt. Dennis Dore, of the Prosecutor's staff of Mercer County, who testified to the taking of a statement from the defendant on April 21, 1948. Lt. Dore stated that he asked the questions which were answered by the defendant and typed by one Henry W. Miller. This statement was signed and sworn to by the defendant on said date before Henry W. Miller, a Notary Public of New Jersey. The statement was received in evidence and marked Exhibit S-2 and reads as follows:

"First Precinct Police

Trenton, N. J., April 21, 1948

Statement Of: J. Minor Sullivan, M. D., residing at #88 Spring Street, Trenton, N. J.

'Statement made in the office of the Prosecutor of Pleas Mercer Co., in the presence of Co. Detective Dennis R. Dore and Police Clerk Miller'

Q. Dr. Sullivan, were you called to the First Precinct Police Station on or about the 9th day of February 1948?

A. I was called there on two evenings, on or about that

date and also on another occasion a day or so later, this time in the afternoon.

Q. Who requested your presence in the Police Station on these visits?

A. Prosecutor Marie H. Volpe.

Q. Did you make any examinations of any prisoners on your visits to the Police Station, on or about the dates mentioned above?

A. I did.

Q. Will you please tell us, if you can recall, the names of the defendants you examined and just what your findings were as a result of your examination and presence at the Police Station?

A. The first boy I examined was one James Thorpe. This defendant was found to have an absence of the left upper extremity. He was found to be apparently physically fit, complaining only of a mild sensitiveness of the surgical stump.

Q. Who next was examined by you?

A. Off hand I believe it was one Collis English. I recall examining this young man's heart and a cardiac deficiency was noted but well compensated. There was no evidence of any bruises or scars on this boy's body. He gave a history of having chronic malaria.

Q. Who next was examined by yourself, Dr. Sullivan?

A. I believe the next was McKinley Forrest. Physical examination showed an absence of scars and bruises and he was essentially negative other than he appeared slightly excited or nervous.

Q. Did you examine any others?

A. Yes, next I believe I examined one Ralph Cooper. Physical examination of this prisoner showed an absence of scars or bruises to any part of the body and the examination was essentially negative other than the prisoner appeared slightly drowsy.

Q. Did you also examine one Horace Wilson another prisoner?

A. Yes, physical examination revealed no evidence of recent scars or bruises about the body. Physical examination was essentially negative.

Q. Did you examine anyone else?

A. I believe the next day in the afternoon I examined one James MacKenzie. He was the look out man. Physical examination revealed no evidence of scars or bruises of a recent nature or date. Physical examination essentially negative.

Q. Dr. Sullivan, who else was present when you made these examinations of the prisoners mentioned above?

A. Dr. George A. Corio and Peyton L. Manning I believe it was. Of course the police and prosecutor's staff were also present at the time.

Q. Dr. Sullivan, were you also present when these defendants read the statements they had previously made to police officers?

A. Yes, I was.

Q. Dr. Sullivan, did you personally question these defendants individually as to the treatment they had received at the hands of the police since their arrest?

A. Yes, I did. Their replies were that they had had no mis-treatment by anyone while being detained by the police.

Q. Did you also question them as to their welfare since they had been kept at the Police Station since their arrest?

A. Yes, I did and their reply was that they had had plenty of food, and cigarettes, as well as sufficient sleep.

Q. Doctor, did you compare your physical examination findings of these prisoners with Dr. Corio?

A. Yes, and they were apparently essentially the same.

Q. When you examined these defendants did they strip themselves of their clothing?

A. Yes, they did.

Q. There is nothing else you can add to the above, there, doctor?

A. No.

J. Minor Sullivan, III, M. D.

Sworn and subscribed to before me
this 21st day of April, 1948.
Henry W. Miller
Notary Public of New Jersey"

". Detective Henry W. Miller of the Prosecutor's sta identified Exhibit S-2 in evidence, and also testified th he was present, with others, in the Captain's office a also in the Clerk's Office of the First Precinct Police St tion in Trenton. He stated that both Drs. Sullivan a Corio were present when the men in custody were broug into the captain's office where certain admissions we made by Cooper, English, Forrest and Thorpe. The spective statements made by Cooper and English we read by them and statements of Forrest and Thorpe we read by Detective Toft. Certain questions were asked ea of them by Dr. Sullivan as to whether or not they we well treated or mistreated while in custody, after whi the statements were signed. The men then disrobed a were examined by Drs. Corio and Sullivan. He stated th all the men undressed themselves with the exception McKinley Forrest, who received some assistance in moving a turtle-neck sweater which he wore. This w ness also testified that he was present on February 12 a among others, Drs. Corio and Sullivan were also pres and that a statement was read aloud by MacKenzie, a that he signed same in the presence of several perso present, after which MacKenzie disrobed and Drs. Co and Sullivan made their examination. The Court permit the several statements of the murder defendants to be re for the sole purpose of knowing just what was done by t defendants in the presence of the witnesses Miller, To

Dr. Corio and the defendant, Dr. Sullivan, and the other persons present, and the conditions under which they were observed by said persons.

Dr. George Corio stated that he was called to the First Precinct Police Station at Trenton at approximately 11 P. M. on February 10, at the request of the prosecutor. Also present in the captain's office was Asst. Pros. Lawton, Prosecutor Volpe, Chief Naples of the Prosecutor's staff, Clerk Miller, Detective Toft, and Captain De Late and eventually Dr. Sullivan and a Mr. Manning also arrived. The doctor testified that while he specializes in the field of ears, nose and throat, he is also the examining physician in the Welfare Department of the City of Trenton; he also examined eight hundred Parochial School children in the first to fifth grades from the end of September to the end of May. He testified as to what was done in his presence by the defendants and what was done by himself and Dr. Sullivan and others, all being present at the same time. Dr. Corio stated that Thorpe had an amputated arm which had been amputated about a week before and that it was dressed. He stated that a statement was read to Thorpe after which it was signed by him and then he was physically examined by Dr. Sullivan and himself, and with the exception of the bandaged amputated arm he could elicit nothing abnormal in the man's condition, in other words, didn't find anything out of the ordinary. The doctor further stated that in his opinion Thorpe was not in a controlled state of mind nor was he in a depressed, susceptible, or suggestible state nor had he been promised something. The doctor stated that after English's statement was read and signed by him, he was examined by himself and Dr. Sullivan. The doctor stated that he elicited a marked cardiac murmum and that English told him and Dr. Sullivan that he had a history of rheumatic fever in his younger days. The doctor stated that outside of the heart condition he found nothing abnormal, and that English was

oriented, knew where he was and what he was doing; that he was not mumbly, confused or highly nervous, and in his opinion Collis English was not in a condition that the State alleges Dr. Sullivan testified to as set forth in the indictments. The doctor stated that the statement of Forrest was read to him by Detective Toft, after which he was stripped down completely and examined and outside of his being a little nervous and a little excited, he didn't find anything abnormal in his make-up. This observation was made while Forrest was signing his initials to the statement. In other words, he stated that McKinley was fidgety; he stated in his opinion Forrest was not in a condition that the State alleges in the indictment the defendant Dr. Sullivan testified to at the murder trial. The doctor stated that Cooper read his statement and he signed same in the presence of himself and Dr. Sullivan, after which the usual questions pertaining to treatment or mistreatment were asked that had also been asked of the other three. After the reading and signing of the statement had been completed by Cooper, and the questions asked, he was examined in the same manner in which the other three were examined by himself and Dr. Sullivan. Dr. Corio stated that Cooper was oriented and so far as he could observe he was not under the influence of marijuana.

The doctor stated that they also examined one Horace Wilson, and while any observation made by anyone as to Wilson is not of any value, the court admitted the testimony only for the purpose of having the time fixed in which all the examinations on the first night were completed.

The doctor stated that he returned to the police precinct on Lincoln's birthday, February 12, at about 11 P. M., when he observed one MacKenzie, and there were present Detective Naples, Mr. Miller, the Prosecutor came in and Captain De Late was there; also Detective Toft, Dr. Sullivan and Mr. Manning, and he was not certain whether or not Mr. Lawton was there. The doctor is probably in error when he says Detective Toft was present on the 12th be-

cause Detective Toft stated that he at no time saw MacKenzie. The doctor stated before MacKenzie signed the statement, he was asked the same questions as to treatment or mistreatment while in custody, and that after the reading and signing of the statement he and Dr. Sullivan examined MacKenzie and that his findings were negative and in his opinion he was oriented, that he was not nervous nor was he moderately excited, drugged, in a controlled state or in a hypnotic state. He stated that "essentially negative" meant to him that there was nothing worth mentioning; in other words, there was nothing important enough to mention. He stated to the best of his recollection McKinley Forrest undressed and dressed himself.

Detective Toft of the Trenton Police Department testified that he was present in the First Precinct Police Headquarters much of the time that all of the murder defendants were in custody, with the exception of MacKenzie; that he was present when the statements were read and signed and stated the names of the other police officers and persons who were present; he said he was also present when Drs. Corio and Sullivan made their physical examinations of English, Thorpe, Forrest and Cooper, and heard Dr. Sullivan ask the suspects whether or not they had been treated well or mistreated in any way. He said that he read the statements aloud to Thorpe and Forrest because they could not read. He stated that English made no complaints whatsoever; that he appeared calm and didn't appear excited, no outward change in his appearance or demeanor. He stated that during the questioning of Thorpe by Dr. Sullivan, the doctor stated to Thorpe that this is a serious thing and he might go to the chair, and that Thorpe minimized the charge by saying that he would get a little time out of it, at which time the prosecutor said "Listen, I want you to get it straight, there will be no promises whatsover in reference to any time or anything else in this case". Prior to the remarks by the prosecutor, Thorpe was confronted with English who accused Thorpe

of being there "with us". He stated that his observations of Forrest were he seemed to be of a nervous temperament with his hands twitching; that he was moving about in the chair and there were outward signs of nervousness about him. He stated that the outward signs he observed at the time that Dr. Sullivan examined him seemed to be about the same as when he first observed Forrest on February 9. He said his observations of Cooper showed him to be lackadaisical, slow moving, and sort of a "Steppin-Fetchit" type, the character in the movies, that is the way Cooper seemed to move; nothing seemed to much bother him.

Dr. Sullivan testified in his own behalf and denied that he perjured himself or swore falsely at any time. Under cross-examination when confronted with his testimony he stated that was what the record shows, that was his testimony. He further stated that his testimony at the second murder trial were medical opinions formed by him after he observed the condition of the murder defendants in the First Precinct Police Station in Trenton on February 10 and February 12, 1948.

The defense called as character witnesses many prominent citizens residing in Trenton and vicinity. All these witnesses testified that the defendant bore an excellent reputation for truth and veracity in the community.

I have carefully considered all of the testimony and evidence produced before me, including that of the reputation of Dr. Sullivan for truth and veracity. After considering the testimony of Detective Miller, Dr. Corio, Detective Toft, and Dr. Sullivan (Miller, Corio and Dr. Sullivan all being present in the First Precinct Police Station on the evenings of February 10 and February 12, Toft being present on February 10). I determine that there was not any basis in fact for the medical opinions expressed by Dr. Sullivan while testifying at the second murder trial to the observations he made of the murder defendants in the First Precinct Police Station on February 10 and 12,

and said opinions expressed by the defendant were false and at the time he made them he knew them to be false.

In State v. Sullivan, 25 N. J. Super. 491, Judge Eastwood said:

> "There is a distinction between an honest but erroneous statement of opinion and a false statement of fact. The latter is held to be a matter of perjury. 70 C. J. S., Sec. 5, p. 462. Similarly, it is held that a false statement of opinion or belief may constitute the offense of perjury and in such matters the existence or non-existence of an opinion or belief is in itself a material matter of fact. 70 C. J. S., *supra*, Sec. 5, p. 462."

I therefore determine that the defendant, Dr. Sullivan was guilty of the first, second, third, fourth, sixth, seventh, and eighth counts of the indictment charging perjury and further determine that the defendant, Dr. Sullivan, was not guilty of the fifth count of the indictment charging perjury. I further determine that my findings relative to the indictment charging perjury are dispositive of the indictment charging false swearing.

/s/ Charles M. Morris,
J. C. C.

OPINION OF THE SUPREME COURT OF NEW JERSEY

No. A-75 Sept. T. 1956

STATE OF NEW JERSEY,
Plaintiff-Respondent,
v.
J. MINOR SULLIVAN, III,
Defendant-Appellant.

Argued January 28, 1957; decided April 1, 1957

On Appeal from the Mercer County Court, Law Division.

Mr. Harold H. Fisher argued the cause for appellant.
Messrs. Shanley & Fisher, Attorneys.
Mr. Frank H. Lawton, First Assistant Prosecutor, argued the cause for the State. Mr. Mario H. Volpe, Mercer County Prosecutor.

The opinion of the court was delivered by

Wachenfeld, *J.*

The legality of a conviction for perjury is challenged on this appeal by Dr. J. Minor Sullivan, III, defendant-appellant, hereinafter referred to as the defendant.

In 1948, William Horner and his reputed wife owned and operated a second-hand furniture store in Trenton. On the morning of January 27, he was brutally beaten to death with a blunt instrument and she was seriously injured by a vicious assault.

It is wholly unnecessary to relate in detail the subsequent factual developments except to say that by reason of

diligent police investigation six suspects were soon apprehended and taken into custody.

Dr. Sullivan is a general medical practitioner residing in Trenton. He was asked by the Trenton police to witness the signing of confessions by five of the six men charged with murder. After his arrival at police headquarters, defendant generally interrogated each suspect in what has since become in legal annals as the "Trenton Six" case. His principal inquiries concerned the treatment they had received while in the custody of the police.

A Dr. George Corio was also summoned to act as an impartial witness. Both doctors gave a brief but fairly thorough physical examination to each of the accused. None of the murder defendants indicated he had been maltreated in any fashion and the doctors found no evidence of physical abuse.

Thereafter, Sullivan was queried by the police as to his findings and conclusions, and the questions and answers were recorded in a notarized statement signed by him.

In June of 1948, the murder indictment was brought to trial. It was a long, complicated and difficult case lasting forty-four days, and during the course of it Sullivan was called upon to testify on two occasions. He first appeared at a preliminary hearing before the trial judge on the admissibility of the confessions, and later he again testified before the jury as the trial proceeded. All five confessions whose signing Sullivan had witnessed were admitted into evidence, and the six murder defendants were convicted by a jury and subsequently sentenced to death.

The judgment so rendered was reversed by this court, *State v. Cooper*, 2 N. J. 540 (1949), on several grounds, including the failure of the jury verdict of guilty to designate the degree of murder in accordance with statutory requirements, and we returned the case for a new trial. To guide the lower court at the second trial, we discussed the admissibility of the aforementioned confessions and cautioned

that "[i]n the enforcement of the constitutional guaranty of due process, the inquiry is whether there has been observance of 'that fundamental fairness essential to the very concept of justice. . . . '" and that "a confession induced by physical or moral compulsion, whatever its nature, has no evidential efficacy." Contrary to Sullivan's present contentions, we did not determine that *in fact* the subject confessions had been obtained without due process.

As a result of this reversal, a second murder trial ensued. Sullivan again testified at the preliminary inquiry as to the admissibility of the confessions and also before the jury itself.

Although Sullivan's testimony grew increasingly unfavorable to the State, the prosecution made no attempt to discard him as a witness until well along in the cross-examination before the jury, when it attempted to plead surprise and thereafter endeavored to neutralize his testimony.

The second trial resulted in the acquittal of four defendants; the remaining two, Collis English and Ralph Cooper, were found guilty of murder in the first degree with a recommendation by the jury of life imprisonment.

We again reversed for numerous trial errors, recited in the opinion in *State v. Cooper*, 10 N. J. 532 (1952). The later developments and ultimate disposition of the "Trenton Six" case are not material and have no bearing upon the issues presented by this appeal.

After the second murder trial, two indictments were returned against the defendant. They are essentially the same except that one charges perjury, the other the crime of false swearing. The State's theory is that after the first trial, Sullivan directed himself toward securing freedom for the murder defendants and to this end willfully falsified his testimony at the second trial in attempting to establish that the defendants were incompetent at the time they had executed their respective confessions. It is said the testi-

mony of Dr. Sullivan at the first trial was true but that he perjured himself, in the manner indicated in the indictments, at the second trial.

Each indictment contains eight counts reciting verbatim portions of the defendant's testimony at the second murder trial of Ralph Cooper, Collis English, McKinley Forrest, John MacKenzie, James H. Thorpe and Horace Wilson regarding his examinations and observations of these defendants and his conclusions as to their mental and physical condition and the cause thereof.

The perjury indictment alleges that Sullivan "then and there did commit willful and corrupt perjury in manner and form aforesaid, contrary to the provisions of R.S. 2:157-1, and against the peace of this State and the government and dignity of the same."

By court order, the indictments were consolidated and tried together. R. R. 3:5-6.

The perjury indictment was attacked by the defendant, who alleged it was predicated upon expressions of professional opinion and belief and failed to contain allegations necessary for charging a crime and was invalid for this and other reasons. The indictment was sustained in 25 N. J. Super. 484 (App. Div. 1953), certification den'd 13 N. J. 289 (1953), certiorari den'd 347 U. S. 903 (1954).

The false swearing indictment was likewise subjected to appellate treatment, 33 N. J. Super. 138 (App. Div. 1954).

To prove the charges made in the indictments, the State introduced transcripts of defendant's testimony at the first and second murder trials. It put upon the stand Dr. Corio and various police officials who were present at the time Sullivan conducted his physical examinations and produced the question and answer statement signed by the defendant in 1948.

The defense was a complete denial and the defendant testified at length. He was supported by character witnesses who testified as to his good repute for honesty and veracity.

By agreement, the case was tried without a jury, and at the conclusion of all of the testimony Judge Morris, who presided, made general and special findings convicting the defendant on seven of the eight counts in the perjury indictment.

The record indicates the State moved for sentence only on the perjury indictment and that no further action was taken upon the false swearing indictment. The latter was apparently disposed of by the trial judge in his remark that the findings made on the perjury indictment were also dispositive of the false swearing indictment. In any event, the indictment charging false swearing is not at issue before us.

The defendant was sentenced to two years on probation and fined $1500.

The defendant urges the findings of the court and the judgment of conviction are contrary to the weight of the evidence and are the result of passion, prejudice and mistake engendered by inflammatory matter and that not only did the State fail to prove Dr. Sullivan corruptly and willfully testified to opinions which he did not hold, but further, the State failed to prove by reliable and competent evidence that the opinions expressed were in fact untrue or invalid.

Perjury was defined by early common law ". . . as the wilful assertion as to a matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether in open court, in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding." 41 Am. Jur., Perjary, § 2, p. 4.

The offense is now controlled by statute in most jurisdictions, but, although these vary to some degree in language, basically there is little difference from the common

law conception. In general, the state legislatures have d
fined perjury as willful and corrupt false swearing or a
firming, under an oath lawfully administered in the cour
of a judicial or quasi-judicial proceeding, to some matt
material to the issue. *State v. Sullivan*, 25 N. J. Super. 4
(App. Div. 1953), citing 41 Am. Jur., supra, § 2, p. 4. S
R. S. 2A:131-1 et seq., formerly R. S. 2:157-1 et seq.

As was determined in State v. Sullivan, supra, the
is a distinction between an honest but erroneous statemc
of opinion and a false declaration of fact. The latter
held to be a matter of perjury. 41 Am. Jur., supra, § 6,
6; 70 C. J. S., Perjury, § 5, p. 462.

Similarly, however, where the existence or nonexisten
of an opinion or belief is in itself a material matter of fa
a false statement as to such may constitute the offen
41 Am. Jur., supra, § 6, p. 6; 70 C. J. S., supra, § 5, p. 462.

The defendant's position here is that it is practica
impossible to convict a doctor of perjury. Apart fr
epistemological problems concerning the imperfections
the senses and the consequent relativity of all knowled
it is urged Sullivan testified only as to medical opinio
and beliefs which, no matter how erroneous, cannot atta
him in the absence of conclusive proof that they were
actually entertained. Defendant says the only direct
reliable proof on the issues raised by the present indictm
would be his admission or confession almost tantamount
guilt.

Additionally, it is said that if contradictions exist
tween defendant's statements at the two murder trials, t
State failed in its obligation to demonstrate the second t
timony was false rather than the first.

These contentions make it important to recognize th
much of Sullivan's testimony dealt with findings resulti
from his examinations of the accused prisoners. To t
extent, he was describing physical manifestations, exclusi
of their supposed cause or psychic effect. The existence

the symptoms to which he testified is fundamentally a matter of fact, readily subject to independent verification or disproof. Most of the alleged findings were the direct product of observation and not the result of scientific tests or research. The police officers in attendance as well as Dr. Gorio are, therefore, qualified to refute the truthfulness of the defendant's testimony in this respect because they had the same opportunities for observation. See *Priest v. Poleshuck*, 15 N. J. 557, 562 (1954); *Koccis v. State*, 56 N. J. L. 44 (Sup. Ct. 1893); 32 C. J. S., Evidence, § 467, p. 107.

Admittedly, Dr. Sullivan also gave evidence in the form of medical opinions based on his physical findings. We now refer to his own diagnoses of the individual prisoners as totally divorced from his answers to purely hypothetical questions. Vide *Beam v. Kent*, 3 N. J. 210, 215 (1949). It is argued these opinions can be proved false only by direct evidence in the form of an admission, but we cannot agree. The evidence presented was more than sufficient to satisfy the rule as to quantum of proof which requires at least the testimony of one witness supported by strong corroborating circumstances to obtain a conviction. *State v. Caporale*, 16 N. J. 373 (1954); *State v. Taylor*, 5 N. J. 474 (1950); *Zabriskie v. State*, 43 N. J. L. 640 (E. & A. 1881); *State v. Bulach*, 10 N. J. Super. 107 (App. Div. 1950); *State v. Ellison*, 114 N. J. L. 237 (Sup. Ct. 1935); *State v. Lapton*, 102 N. J. L. 530 (Sup. Ct. 1926); *Dodge v. State*, 24 N. J. L. 455 (Sup. Ct. 1854).

To hold that a "confession" by a doctor is an indispensable prerequisite to proving he willfully and corruptly gave false opinion testimony would place an intolerable and impossible burden on the State in its prosecution and would subject the entire judicial process, both civil and criminal, to the spectre of fraudulent testimony freely given with complete immunity and without fear of subsequent prosecution. We hold high regard for the competence and

integrity of the medical profession, but we must reluctantly recognize that, like any other profession, it occasionally harbors members whose ethics are not compatible with the lofty and established standards of the group.

The present indictment was sustained in the Appellate Division, where it was said:

> "The defendant's statements as to a nervous, drugged, amnestic or suggestive state of mind in the several murder suspects, may constitute perjurious testimony for the reason that it is alleged that he well knew the absence of their factual existence when he swore to them in his testimony *and that he did not hold a firm belief in their existence under the circumstances of the case.* Under either or both circumstances, an indictment may be warranted." (Emphasis supplied.) *State v. Sullivan*, 25 N. J. Super. 484, 492 (1953).

The strength of the law will continue only as long as it remains intimately acquainted with reality. It is not an abstract science. Considered in vacuo, the defendant's opinions and beliefs might possibly be unimpeachable, but we are here concerned with actualities as reflected in "the circumstances of the case." The record convinces us that these selfsame circumstances as intertwined in all of the evidence clearly and logically point to the defendant's guilt in the respects hereinafter delineated.

In general, Sullivan's statements at the second trial varied violently from those he delivered at the first. Indubitably realizing he had been called upon because of his race and special qualifications as a physician to verify the good faith of the accused's confessions and their voluntariness, he manifested in his sworn statement to the police and in the testimony he first gave that there was nothing seriously amiss physically or mentally with the murder defendants which would disqualify the confessions they had made.

On his subsequent appearance three years later, his answers were radically different. Then, in effect, he stated all of the murder defendants, for one reason or another, were totally incapable of understanding the serious consequences of their confessional act, and that their physical and mental conditions were such as to negative the voluntariness of their statements.

Defendant asserts a doctor is entitled to change his professional views, and we cannot quarrel with this academic observation. We, however, are concerned with the actualities of judicial proceedings, and unless such change is upon valid grounds and for good reason, there is a justifiable inference that its motivation is corrupt. When witnesses for the State directly controvert the existence of the facts upon which the new opinions are allegedly predicated, this inference may, under the circumstances, ripen into a reflection of guilt sufficient to be considered by a jury or a judge.

True, Sullivan's interrogation at the second trial was far more vigorous and searching with regard to the mental state of the respective murder defendants than at the first trial. This may possibly, as the defendant contends, have been induced by our own opinion at 2 N. J. 540, where the effect of moral compulsion as a factor invalidating confessions under the due process clause was discussed.

But there was some limited cross-examination in this respect at the first trial, and on the second murder trial Sullivan was advised on several occasions of his right to refuse to answer questions relating to psychology if he deemed himself unqualified. The defendant took none of the shelter offered by the court and during the perjury trial consistently affirmed his intention to abide by his previous testimony "if that is the record."

In the defendant's presentation the different counts of the indictment are separately reviewed, and for the sake of clarity we shall do likewise in our disposition here.

RALPH COOPER.

The first count of the indictment charges that Sulliva perjured himself by testifying as follows:

"Q. And I ask you specifically was his conditio such, that you, a trained medical observer, you fe from your experience that he was under the influen of drugs at that time?. A. Yes, he appeared to be so

"Q. Doctor, as a result of having your previou testimony read to you for the purpose of refreshin your recollection, and directing your attention to th condition of Ralph Cooper as a result of your examina tion of February 10th, or the early morning hours o the 11th, could you now state as to whether his cond tion was not caused by drugs? A. From the exam ination and observation of drowsiness and laziness a stated in the previous testimony, and redness of th eyes which indicated to me, suggested to me to ask th man if he had been smoking marijuanas, I say it coul have been—it was caused by marijuanas."

This testimony considered in the context of the whol record does not satisfy us beyond a reasonable doubt th Sullivan committed perjury. With respect to the sympton set forth, defendant consistently testified throughout bot murder trials that Cooper was drowsy and lazy and showe congestion and inflammation of the eyes. There was n substantial deviation from his initial testimony at the fir trial.

It is evident that Sullivan honestly thought there wa at least a strong possibility Cooper had been smokin marijuana. During his examination of the suspects police headquarters, Sullivan asked Cooper whether h had recently used "reefers." On cross-examination at th first trial, Sullivan stated: "Well, he looked to me like h had been smoking reefers." In response to the questio "Cooper you saw in such a condition that you thought h

had been taking drugs; is that right?", Sullivan testified, "I guess—yes."

Defendant's testimony at the second trial was compatible and consistent with his utterances at the first trial. There is no material conflict, and we find no evidence in the record sufficient to support a conviction on this count.

McKinley Forrest.

Giving defendant the benefit of all favorable inferences and a microscopic scrutiny of the record, we cannot sustain his conviction upon Counts 4, 7 and 8 of the indictment. These set forth portions of defendant's testimony at the second trial relating to the physical and mental condition of McKinley Forrest.

In his written statement prepared in 1948, Dr. Sullivan said Forrest "was essentially negative other than he appeared slightly excited or nervous." During the first murder trial, defendant upgraded this appraisal to "moderately excited." "Moderate" was described as a stage of excitement between "slight" and "maniacal." It was asserted this middle stage of emotional disturbance manifested itself in a tremor of the hands and Forrest's difficulty in removing his clothes, which necessitated assistance.

At the second trial, Dr. Sullivan testified that at the time of his physical examination Forrest had been in a stage of hysteria, "was so afraid he couldn't tell just what was going on," and that "it was impossible" for him to remove his clothes. These matters were stated as conclusions.

Although this testimony created an impression of mental disability which was absent at the first trial, in light of the entire record we do not find the evidence warrants a conclusion that the State adequately demonstrated the change was animated by a corrupt motive.

It may well be said a shift in emphasis rather than substance took place. Perhaps this is explainable, at least

in part, by the fact that at the second trial it was disclosed to Dr. Sullivan that shortly before his physical examination of McKinley Forrest the subject had suffered a complete nervous breakdown necessitating the services of a physician who administered sodium amytol. In reply to inquiries by counsel for the murder defendants, Dr. Sullivan attributed his change in diagnosis to this previous history of mental unbalance of which he was unaware at the first trial.

Detective Henry W. Miller, called for the State at the perjury trial, confirmed the symptom of trembling and stated Forrest stuttered and had to be assisted in removing a sweater. Dr. Corio also stated Forrest was excited, although he denied the prisoner needed help in undressing.

In light of these developments, we cannot say Sullivan's testimony with relation to Forrest diverged so substantially from the facts and his previous statements as to warrant a conclusive imputation of calculated falsehood.

However, the same meticulous perusal of the record and concern for defendant's rights which induced us to reverse the conviction on Counts 1, 3, 7 and 8 of the perjury indictment firmly convince us beyond a moral certainty of the guilt of Sullivan with respect to Counts 2, 4 and 6. Count 5 was disposed of by the trial judge's acquittal.

Collis English.

The second and sixth counts of the indictment charge Sullivan perjured himself at the second trial in testifying concerning the physical condition and mental state of Collis English at the time he made his confession. In substance, these counts allege that Sullivan lied when he declared English to be a "little mumbly," a "little confused," "highly nervous" and in a psychoneurotic condition attributable to mental pressure.

Both examining doctors found that English had a serious heart murmur. At the first trial, this was the only symptom to which Dr. Sullivan testified. On cross-examina-

tion, he stated English "talked freely" and that he could recall only one prisoner being nervous, McKinley Forrest.

On preliminary examination at the second murder trial, Sullivan's initial answers were totally consistent with his testimony at the first trial. He said his findings with regard to English were essentially negative, except for the cardiac condition, and indicated that among Cooper, Thorpe and English, only Cooper had displayed signs of a mental disturbance.

When the jury was called in, Sullivan suddenly underwent a complete transformation. In place of being a witness for the State, he was now a potent ally of the defense. English, according to this testimony, was a "psychoneurotic" whose condition had been occasioned by mental stress, leaving only the inference that questionable or unlawful police methods were the causative factor. To eliminate any doubt as to the deplorable mental condition of English, Sullivan testified he was extremely subject to suggestion, not reliable, and "under mental pressure" would be deprived of his free will. From one who "talked freely" and had no symptoms other than a "cardiac deficiency . . . well compensated," English was now, according to Sullivan's testimony, "confused," not very reliable, and "highly suggestible" as "the result of pressure" and was incompetent to execute a confession.

Additionally, Sullivan's notarized statement to the police made no reference to any of the symptoms which on the second trial he suddenly claimed to have discovered. His conclusions at the second trial were a far cry from his original findings of "essentially negative."

The detectives who appeared for the State against Dr. Sullivan and who had enjoyed frequent opportunities to observe English testified he was completely oriented, responsive and calm. They, along with Dr. Corio, denied that English mumbled or appeared confused and "highly nervous." Dr. Corio refuted the existence of a "psychoneurosis."

In our opinion, it was fully established that Dr. Sullivan, as charged in these counts, gave perjured testimony and that the totality of the circumstances proves beyond a moral certainty the evidence he gave was false, corrupt and deliberately contrived to mislead the jury.

The conviction on the second and sixth counts of the indictment is affirmed.

JOHN MACKENZIE.

Count 4 of the indictment contains Sullivan's allegedly perjurious testimony respecting his findings from the physical examination of MacKenzie.

In essence, it is charged that defendant falsely testified MacKenzie was nervous and moderately excited, "that he appeared to be in a controlled state, as if having had a drug," and that "I don't know of any other situation that might put a person in a controlled state other than the hypnosis." Read as a whole, defendant's assertions spawn the idea that MacKenzie was deprived of his free will by the administration of drugs.

We can find nothing in the record to warrant this testimony, and we must conclude that Sullivan lied as to his opinions.

In the course of the perjury trial, Dr. Corio denied the existence of any physical or behavioral indications that MacKenzie was excited and in a controlled state attributable to the taking of drugs.

Dr. Sullivan in his notarized statement described the results of his physical examination as "essentially negative." The final question contained in this document reads: "There is nothing else you can add to the above, is there doctor?" Sullivan's reply was a categorical "no."

During the first murder trial, Sullivan underwent a severe and militant interrogation concerning his examination of MacKenzie. He emphatically denied the existence of any abnormality. In reply to specific and pointed questions, he testified MacKenzie was not irrational and there

was nothing "strange" about him. In addition, Sullivan said: "I can't recall him being nervous," and "he was normal."

Counsel for the murder defendants, undaunted, continued to probe. It was stated that several days after his physical examination MacKenzie became so excitable he had to be confined to a padded cell. Sullivan was asked whether this information would cause him to alter his testimony. Defendant steadfastly declined to budge from the position that MacKenzie "was normal" in all respects. Relying on his considerable experience, Sullivan expressly refused the contention that this subsequent mental disturbance indicated MacKenzie could have been under the influence of drugs at the time he was examined.

Disregarding minor conflicts and adopting the version of his testimony most favorable to defendant, nothing can justify the incredible variation between the first and second murder trials. If MacKenzie were in fact observed to be in a controlled state presumably brought on by drugs, it is not likely Sullivan would conceal this information from the police and not even mention it to his fellow examining physician, Dr. Corio. In 1948, Sullivan said he compared his findings with those of Dr. Corio and "they were apparently essentially the same."

We cannot believe Sullivan was ignorant of the purpose of his visit to police headquarters and failed to realize the State would rely upon him as an impartial witness. Yet it was only upon trial in 1951 that he first indicated the murder defendants were timorous, drugged, nervous and excited to the point of mental distraction and docilely following a will not their own, rather than men in the full possession of their faculties.

There are material discrepancies in Sullivan's testimony which he did not attempt to reconcile or to explain. Other witnesses refuted the truthfulness of his statements. We have no reason to question either the capacities or the honesty of those witnesses. The evidence against Sullivan

is compelling and excludes every other rational hypothesis save that of guilt.

We conclude the conviction should be affirmed as to Count 4, as well as Counts 2 and 6, of the perjury indictment.

Defendant further contends the verdict was the result of passion, prejudice, partiality and mistake engendered by the prosecutor's inflammatory remarks. To support this argument, reference is made to alleged inadequacies in the special findings rendered by the trial judge pursuant to R. R. 3:7-1(c). It is said the trial judge "did not, *because he could not*, point to falsity of fact, falsity of the existence of opinions, and knowledge and corrupt intent of such falsity."

On several occasions, we have announced that we will not hesitate to reverse when the prosecutor exceeds the latitude allowed for a forceful and vigorous presentation of the State's case. *See State v. Circo*, 22 N. J. 236, 247 (1956); *State v. Siciliano*, 21 N. J. 249, 263 (1955); *State v. D'Ippolito*, 19 N. J. 530, 550 (1955). Primarily, his remarks must not misrepresent the evidence nor diverge in a brazen manner from the facts of the case. *See State v. Bogen*, 13 N. J. 137 (1953); *State v. Gyillo*, 11 N. J. 173, 183-84 (1952); *State v. Tansimore*, 3 N. J. 516, 534-36 (1950).

We do not think the statements criticized go beyond a permissibly vigorous presentation. It was necessary for the prosecutor to describe antecedent events in order to place the perjury proceeding in its proper setting and perhaps to show motive for falsification. As to the results of the two murder trials, no prejudice arose because admittedly the trial judge could have taken judicial notice of the previous records of the court. Undoubtedly, he knew of those verdicts anyway.

We also take into account the absence of a jury. By virtue of tradition, training and responsibility, the average judge is less likely to be swayed from objectivity through passion or the mere eloquence of counsel. From daily ex-

perience, he acquires a certain immunity to lawyers' emotional perorations and inevitably turns to the evidence as his ultimate guide.

An exchange between Judge Morris and defense counsel at the end of the prosecutor's summation is enlightening in this respect:

> "Mr. Lord: If your Honor please, I object to these disparaging remarks that's just been read to the Court. I am sure your Honor will decide the case on the record, and your Honor will be able, without my enumerating the remarks by the prosecutor, I am sure your Honor will be able to separate not only the portrait and philosophy of the prosecutor from the record but also his personality, so I shall have no further remarks to make."

We have the same confidence in the trial court that was voiced by counsel for defendant. As he expressed himself, there was little fear that the judge below would be prejudiced by any infiltration of "inflammatory matter."

Turning now to consideration of the special findings, we conclude they were sufficiently adequate and that defendant is not prejudiced on this appeal by their alleged generality. The trial judge gave a terse summary of the evidence adduced and determined "there was not any basis in fact for the medical opinions expressed by Dr. Sullivan while testifying at the second murder trial to the observations he made of the murder defendants in the First Precinct Police Station on February 10 and 12, and said opinions expressed by the defendant were false and at the time he made them he knew them to be false."

Although we find no harmful error, it is nevertheless the better practice to draw a more explicit finding which will be of greater aid on review. Here, since the special findings obviously refer to the testimony set forth verbatim in the indictment, any anticipated difficulty in ascertaining their meaning and effect was largely alleviated.

The final portion of this opinion deals with questions of admissibility.

The previous testimony of Peyton L. Manning was offered to corroborate Sullivan's statements as to the nervous and excited condition of the murder defendants, particularly McKinley Forrest. Manning had accompanied Sullivan to the Trenton precinct station in 1948 and had also witnessed the signing of the confessions at the invitation of police officials. He testified on behalf of the State at the two murder trials.

Without delving into the question of whether there must be mutuality of parties to permit admission of former testimony, it is sufficient to say that the refusal in this case was proper since there was no showing that Manning was unavailable to testify in person. See R. S. 2A:81-14; *The N. Y., Lake Erie & Western Ry. Co. v. Haring*, 47 N. J. L. 137, 139 (E. & A. 1885); *State v. Hogan*, 132 N. J. L. 148; 151 (Sup. Ct. 1944), rev'd on other grounds 133 N. J. L. 59 (E. & A. 1945); *Cino v. Driscoll*, 130 N. J. L. 535, 541 (Sup. Ct. 1943); *Berney v. Mitchell*, 34 N. J. L. 337, 341 (Sup. Ct. 1870); V *Wigmore, Evidence*, § 1402 (3d ed. 1940); *Uniform Rules of Evidence*, 63(3)(b). Defendant does not claim even now that Manning was in fact unable to take the stand.

For the same reason, the exclusion of Dr. Moore's former testimony was proper. He had treated Forrest during his mental collapse.

The trial court also refused to admit evidence from medical books purportedly relied upon by Sullivan in forming his diagnoses. This offer was made in order to show that defendant's opinions were conceived and reported in good faith at the second murder trial.

The trial judge could well have permitted the introduction of excerpts from these learned treatises. They were offered not to prove the truth of the matters asserted therein but solely on the issue of intent. Cf. *Lamble v. State*, 96 N. J. L. 231 (E. & A. 1921); *N. J. Zinc Co. v. Lehigh*

Zinc Co., 59 N. J. L. 189 (E. & A. 1896). Rules circumscribing admissibility are also in normal practice considerably relaxed in the absence of a jury.

We, however, see no abuse of discretion under the circumstances. The offer was somewhat remote, and its exclusion was justified as discretionary. See *Bozse v. Metropolitan Life Ins. Co.*, 1 N. J. 5 (1948). Cf. *Iverson v. Prudential Ins. Co.*, 126 N. J. L. 280 (E. & A. 1940); *Miller v. Trans Oil Co.*, 33 N. J. Super. 53 (App. Div. 1954), aff'd 18 N. J. 407 (1955).

Sullivan testified his opinions were premised on certain facts he had observed. The diagnoses in the treatises were obviously based on the assumed existence of the same symptoms. If these symptoms were not actually present in the murder defendants, Sullivan's opinions were unwarranted and all of the medical treatises in the world could not affirm his honesty.

Therefore, the ruling against admission did not prejudice him. The mere existence of other opinions coinciding in form of expression with his testimony lends frail support to his protestations of good faith. Furthermore, Sullivan was later permitted to testify as to which authorities supported his views.

Objection is also made to the exclusion of two memoranda allegedly prepared by defendant at or around the time when the physical examinations were made in 1948. These were offered to demonstrate that Sullivan's testimony at the second trial was not a recent fabrication induced by the wholesale verdict of guilty in the first murder trial.

The general rule denies admission to prior consistent statements offered to bolster a witness' testimony. *State v. D'Ippolito*, 19 N. J. 540 (1955); *Gluck v. Castles Ice Cream Co.*, 104 N. J. L. 397 (E. & A. 1928); *State v. Griffin*, 19 N. J. Super. 581 (App. Div. 1952); IV *Wigmore, Evidence*, §§ 1124 and 1125 (3d ed. 1940). Cf. *Capozzoli v.*

Capozzoli, 1 N. J. 540 (1949). An exception is made, however, when the witness has been impeached by a previous showing of bias, interest or corruption or when it is charged that the testimony in question is a "recent contrivance." In general, the evidence may then be admitted solely to sustain the credibility of the witness. *State v. Neiman*, 123 N. J. L. 341 (Sup. Ct. 1939), aff'd o. b. 124 N. J. L. 562 (E. & A. 1940); *State v. Kane*, 9 N. J. Super. 254 (App. Div. 1950); *IV Wigmore, Evidence*, §§ 1128 and 1129 (3d ed. 1940). See *Epstein v. National Casualty Co.*, 1 N. J. 409 (1949).

But this is not to say the evidence *must* be admitted under any circumstances. The trial judge always retains a wide latitude of sound discretion which the Appellate Court must respect. See *Epstein v. National Casualty Co., supra; State v. Kane, supra*. We think his refusal in this case was warranted by the obvious unreliability of the memoranda which had a marked tendency to vitiate their usefulness.

D-4 contains brief notations allegedly made during the course of the physicals. Apparently, it was not even referred to during the first murder trial. There, Sullivan was asked several times about the existence of a "prescription blank" containing the names of the defendants he had examined. This "blank" was produced but counsel for the murder defendants never caused it to be marked or admitted into evidence. D-4 is *not* a prescription blank and in addition to the names of the murder defendants contains penciled remarks as to their condition and some extraneous matter totally unrelated to the issues of the case.

D-4 was produced and marked at the second trial but apparently did not go into evidence. Sullivan testified he also had other notations on a prescription blank.

D-5 is a photostatic copy of an "Explanation of Findings" allegedly drawn by Sullivan several days after he went to police headquarters in 1948. As far as we can

ascertain from the record, this memorandum was not referred to at either the first or second murder trials.

Sullivan testified that subsequently to preparing D-5 he placed it in a bank vault in New York at the direction of his attorney. Later, he was advised to make photostatic copies of the document. This was done, and the photostats were in turn placed in the bank vault. But it is claimed that in the interim the original of D-5 mysteriously disappeared from defendant's bedroom.

Thus, D-4 and D-5 were at all times in defendant's exclusive possession. They were allegedly written for his own use, and no one can verify the time of their making. Unlike the situation where third parties testify as to prior consistent statements and place their own credibility on the scales of justice, we have only the word of Sullivan, the party in interest, to vouch for these documents.

At the first trial, Sullivan testified he took notations during the course of the physicals on a "prescription blank." But D-4 is a letterhead. This raises the inquiry of whether defendant actually took two sets of notes at police headquarters.

Additionally, despite frequent requests for memoranda during the two murder trials, the existence of D-5 was apparently never disclosed. The original having been lost, its authenticity cannot now be investigated. We are led to inquire why the photostatic copies were so rigorously protected while the original was neglected. Sullivan's testimony with regard to D-5 borders on the incredible.

Whether D-4 and D-5 should have been accepted into evidence is highly debatable, and we can find no harmful error in the exercise of a legitimate judicial discretion which resulted in their exclusion. Furthermore, Sullivan was permitted to testify from D-4 and D-5 during his trial and their contents, at least to some extent, were entered upon the record.

When a trial judge sits alone, questions of admissibility tend to lose much of their legal distinctiveness and to fade

imperceptibly into questions of weight. It is perfectly obvious that had D-4 and D-5 been admitted, their receipt would not have balanced the vast weight of the incriminatory evidence so as to affect the disposition below. Even assuming their rejection was technically in error, we conclude the defendant suffered no "manifest wrong or injury." R. R. 1:5-1(a).

Lastly, it is contended reversible error was committed in receiving evidence of the verdicts at the second murder trial, which we have already disposed of, and a radio statement made on that occasion by Dr. Sullivan expressing his happiness with the results.

The latter ruling cannot be seriously deemed to have harmed Dr. Sullivan.

Sullivan conceded the tape recording of his radio interview was accurate. Defendant's counsel admitted the "statement itself is harmless" but criticized its relevancy. The recording was played without objection. At the conclusion of the trial, the defense merely offered a general protest against the receipt of all evidence deemed to be irrelevant or otherwise objectionable.

Our study of the entire record brings us to the conclusion the defendant suffered no manifest wrong or injury and that the legal error he claims occurred at the trial did not prejudice him in making his defense. As was said in *State v. Orecchio*, 16 N.J. 125, 129 (1954):

> "The sound administration of criminal justice in our democracy requires that both the end and the means be just. The accused, no matter how abhorrent the offense charged nor how seemingly evident the guilt, is entitled to a fair trial surrounded by the substantive and procedural safeguards which have stood for centuries as bulwarks of liberty in English speaking countries. This, of course, does not mean that the incidental legal errors, which creep into the trial but do not prejudice the rights of the accused or make the

> proceedings unfair, may be invoked to upset an otherwise valid conviction; under these circumstances it would be grossly unjust to the State and its people to grant a new trial, and in recent days this court has not hesitated to deny such relief to the defendant. . . ."

Cf. *Wilson v. Savino*, 10 N. J. 11 (1952); *Cherr v. Rubenstein*, 22 N. J. Super. 212 (App. Div. 1952).

The judgment of conviction is affirmed on Counts 2, 4 and 6 of the perjury indictment and reversed as to Counts 1, 3, 7 and 8.

WEINTRAUB, *J.* (Dissenting).

A physician was here convicted of perjury with respect to "medical opinions" given at a trial. There were eight counts. The trial court acquitted on one and convicted on the remaining seven. The majority opinion concludes defendant was innocent of four additional counts, but affirms the conviction on the remaining three.

There was another indictment for false swearing which was tried with the perjury charge. The majority opinion reads:

> "The record indicates the State moved for sentence only on the perjury indictment and that no further action was taken upon the false swearing indictment."

As I read the record, there was no verdict on the false swearing indictment. Rather the trial court deemed its finding on the perjury charge to foreclose a conviction for false swearing based upon the same testimony. Hence we have before us only the conviction for perjury.

I do not quarrel with the abstract proposition that an opinion, as distinguished from a statement of fact, may be perjurious. But we should recognize the inherent dangers of injustice when a medical opinion is thus assailed. It is commonplace for experts to differ in equal numbers. It would be absurd to suggest that the testimony of any two

will suffice to convict another who differs with them. The point is that the issue is not whether a defendant's *opinion* is false, but whether his *belief* in his opinion is false, and it is the falsity of his *belief* in that opinion which must be demonstrated. Proof that others hold a contrary opinion evidences disagreement and nothing more.

It may indeed be difficult to prove such a case. But that is exactly as it should be. The badge of criminality should be richly deserved. We do not sacrifice individuals for some prophylactic benefit to society. On the contrary, we surround men accused of crime with assurances against unfairness because we conceive that justice to the individual is the only defensible course.

This case is made still more unusual by the circumstance that the testimony charged to be false was given on cross-examination and on redirect. I agree that a departure from or an addition to direct testimony may be perjurious. But it would seem elementary that in such circumstances a charge of perjury should not be sustained unless a corrupt motive is evident. Cross-examination is rightly extolled as "the greatest legal engine ever invented for the discovery of truth," 5 *Wigmore, Evidence*, (3d ed. 1940), § 1367, p. 29. Its purpose is to achieve departures from direct, both departures which are literal and departures which arise in ultimate effect from the development of additional facts or views. I am sure no one would subscribe to a caveat to every witness that if he deviates from his direct testimony he will thereby sign his own commitment.

It was originally held in the case of perjury that falsity had to be shown by direct and positive testimony of two witnesses. Later the rule was relaxed so that such testimony of one witness plus strong corroboration as to falsity would suffice. The weight of authority denies the efficacy of circumstantial evidence alone and the minority who differ are nonetheless more exacting in the measure of proof than in the case of other crimes. 41 *Am. Jur., Per-*

jury, § 65, p. 35; *Annotations*, 15 *A. L. R.* 634 (1921); 27 *A. L. R.* 857 (1923); 42 *A. L. R.* 1063 (1926); 111 *A. L. R.* 825 (1937). The wisdom of the basic rule has been questioned. But it rests not upon some ancient quirk but rather upon the public interest in advancing the investigation of truth, an interest which is furthered by protecting witnesses against retaliatory charges spawned in disappointment in the outcome of a trial. This court recently reaffirmed the rule that two witnesses or one plus strong corroboration are necessary; *State v. Caporale*, 16 N. J. 373, 376 (1954), wherein it quoted with approval the following from *State v. Bulach*, 10 N. J. Super. 107 (App. Div. 1950):

> "* * * In this State we have adopted the test that the oath of a single witness must be supported by 'proof of *strong* corroborating circumstances of such character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence,' 'something more than the mere weight of evidence in favor of the state.' * * *"

Nor may falsity be established merely by proving prior inconsistent statements. 41 *Am. Jur.*, *Perjury*, § 66, p. 36; 2 *Wharton, Criminal Law* (12th ed. 1932), § 1583, p. 1837. Rather the State must charge and prove which of the two statements is perjurious.

Perjury is a high misdemeanor. We have a lesser crime, false swearing, legislatively devised to avoid the rigorous requirements which attend the charge of perjury. *State v. Kowalczyk*, 3 N. J. 51 (1949). Thus in charging false swearing contradictory statements under oath may be alleged without specifying which is false and proof of the statements "is prima facie evidence that one or the other is false." *N. J. S.* 2*A*:131-5. The rule requiring two witnesses or one together with corroboration is expressly made inapplicable. *N. J. S.* 2*A*:131-6. And whereas perjury, as statutorily defined, requires proof that the de-

fendant "willfully and corruptly" committed the perjury, *N. J. S.* 2*A*:131-1, the false swearing statute requires only a showing that the defendant "willfully" swore falsely, *N. J. S.* 2*A*:131-4, "willful" being defined "to mean intentional and knowing the same to be false". *N. J. S.* 2*A*:131-7. These statutory provisions succinctly contrast perjury with false swearing. The conviction here is for perjury.

A *medical opinion* is a conclusion from *facts*. If a physician swears to the truth of those *facts*, proof by qualified observers that the facts were otherwise may well suffice to sustain perjury charged with respect to the testimony as to such facts. Where the *medical opinion* is charged to be perjurious, conflicting *medical opinions* of others may prove the *medical opinion* to be erroneous, but cannot prove that the defendant's belief in his opinion was false; at least I cannot conceive hypothetically a case in which they could. Whether perjury charged to reside in an *opinion* may be made out by proving the falsity of the *facts* which the physician swore he observed and relied upon, is difficult to consider in a vacuum. The prudent course there would be to charge perjury as to the factual observations rather than in the opinion.

I.

R. R. 5:7-1(e) provides:

> "In a case tried without a jury the court shall make a general finding and shall, in addition, on request, find the facts specially."

The trial court announced its general finding and some six weeks later filed its written special findings of fact. In passing, note should be made of this sequence of events. I appreciate the rule does not require the special findings to precede the general finding of guilt, but ordinarily, and especially in a matter as complex as this one, such should be the order, and for the obvious reason that the fact-

finding process may well command an acquittal notwithstanding an initial gross impression of guilt. *Cf. New Jersey Bell Telephone Co. v. Communication Workers of America*, 5 N. J. 354, 380 (1950).

The special findings recite at length the evidence pro and con without any findings of fact therein and then conclude with this single "finding":

> "I determine that there was not any basis in fact for the *medical opinions* expressed by Dr. Sullivan while testifying at the second murder trial to the observations he made of the murder defendants in the First Precinct Police Station on February 10 and 12, and the *said opinions* expressed by the defendant were false and at the time he made them he knew them to be false." (italics added)

The majority deem this finding to comply with the rule. In my view, it discloses no special findings of fact whatever. It adds nothing to the general finding of guilt, except to clothe it with uncertainty as to precisely what was found to have been perjurious.

Special findings were uniquely necessary in this case. The indictment charged various statements to be false, some of which were statements as to facts observed, others as to opinions or diagnoses without disclosure of all of the facts upon which the opinion or diagnosis was based, and still others consisted of answers to wholly hypothetical questions. The majority opinion classifies observations, such as to nervousness, to be matters of fact rather than of medical opinion, and with this I agree. The trial court did not find that any of the factual observations to which Dr. Sullivan testified were false; rather it found falsity only with respect to "medical opinions", and did so by concluding that there "was not any basis in fact" (we are not told what the facts were found to be) for the opinions.

The trial court not having pointed to the "medical opinions" he found to be false, nor the facts from which

he so concluded, we cannot turn to the record to see if his findings are supported by the required evidence. If I correctly read the majority opinion, falsity seems to have been found with respect to Dr. Sullivan's factual observations and upon that premise in his medical opinions as well. Thus for all we know, the majority result may well rest upon original findings diametric to those of the trial court.

Moreover, the finding does not include a finding of the *mens rea* required by the statute. As already pointed out, *N. J. S.* 2A:131-1, reads:

> "A person who *willfully and corruptly* commits perjury * * * is guilty of a high misdemeanor." (italics added)

The trial court found that Dr. Sullivan testified falsely with knowledge of falsity. But it did not find that Dr. Sullivan did so intentionally, and more importantly it did not find that he did so "corruptly". If the case had been tried before a jury and the jury had been instructed that it need find only falsity and knowledge of falsity, we would have to reverse the conviction. *Morissette v. United States*, 342 U. S. 246, 274 (1952). Dealing as we are with an alleged conflict between testimony given on direct and testimony on cross-examination, the element of corrupt purpose is of unusual significance.

The rule requiring special findings has an obvious purpose, to wit, to enable the appellate court to determine (a) whether the evidence will support the facts as found and (b) whether the facts as found will support the conviction. It is impossible so to review this case, and the majority make no pretense that this is the review they give. On the contrary, the majority launch into a *de novo* trial of a charge of high misdemeanor and make their own findings with complete disregard of what the trier of facts found or did not find. Not only may the majority have found to be false what the trial court found to be true, but it is indisputable that the majority found Dr. Sullivan

testified corruptly while the trial judge either found that he did not or failed to make any finding whatever.

In *State v. Catalano*, 30 N. J. Super. 343 (App. Div. 1954), a conviction for a disorderly persons offense was reversed where the findings failed to include an essential element of the offense, to wit, the existence of an unlawful purpose. The Appellate Division expressed doubt as to its power to make new findings, but concluded that in any event it ought not to do so in that case.

Whatever the ambit of the provision in *R. R.* 1:5-4, as amended since *Catalano*, that "new or amended findings of fact may be made, but due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," surely the rule was not intended to nullify the mandate of *R. R.* 3:7-1(*c*). *Rule* 3:7-1(*c*) was borrowed from Federal Rule of Criminal Procedure 23 (*c*) which in turn was taken from the Connecticut practice. The purpose of special findings is to increase the protection to an accused by affording a review unavailable where trial is by jury. Hence the trial court's "findings should contain the subordinate facts found and then the conclusions reached from those subordinate facts." *State v. Frost*, 105 Conn. 326, 135 Atl. 446, 449 (Sup. Ct. 1926), cited in the Tentative Draft of Rules of New Jersey (1948), p. 55.

In *Borough of Park Ridge v. Salimone*, 21 N. J. 28 (1956), a civil proceeding, this court said (p. 39):

> "* * * It is to be noted that the Commission did not make any specific findings with respect to the charges but contented itself with merely making a general finding that guilt had not been established by the greater weight of the evidence. For this it must be criticized. *Abbott's Dairies, Inc. v. Armstrong*, 14 N. J. 319 (1954); *Household Finance Corporation v. Gaffney*, 11 N. J. 576 (1953); *In re Central R. Co. of N. J.*, 29 N. J. Super. 32 (App. Div. 1953); *Family Finance Corporation v. Gough*, 10 N. J. Super. 13 (App. Div. 1950).

> 'These findings are of the utmost importance not only in insuring a responsible and just determination by the Director, but also in affording a proper basis for effective judicial review.' *Abbott's Dairies, Inc. v. Armstrong, supra*, 14 N. J. at page 332.
>
> 'If the Commission had taken the time to analyze the testimony in this case it could not possibly have reached the superficial and erroneous conclusion to reverse the borough council. * * *'''

In *Van Sweringen v. Van Sweringen*, 22 N. J. 440 (1956), a conviction for criminal contempt was reversed because the matter was tried before the offended judge. This court did not undertake itself to try the cause on the dry record. Rather it said (p. 449):

> ''In passing, it is to be observed that we have not considered or resolved the factual issues. It is particularly desirable in the circumstances of this case that a prejudgment of fact be made by a trial judge who has observed all the witnesses because credibility plays such a large role. The opinion of the Appellate Division lends the impression that the court was reluctant to undertake a general evaluation of the evidence taken at the trial level and as affected by the further original evidence which it ordered by deposition. This, undoubtedly, in view of the important role of the trial court in observing the witnesses at first-hand, a factor recognized in the philosophy of the court rules relating to the factual review where the findings are made by a judge rather than a jury, R. R. 1:5-4(b). * * *'''

See also *New Jersey Bell Telephone Co. v. Communication Workers of America, supra* (5 N. J. 354, 374 to 379).

A potent consideration in Dr. Sullivan's decision to waive a jury probably was the involved nature of the charge

and the consequent possibility of a conviction by a broad brush. He did not bargain for what he is now receiving. He never agreed that an appellate court sit *de novo* and decide his guilt of a high misdemeanor in a process which is tantamount to trial by deposition without opportunity to observe the witnesses and in which a conviction may be returned, as it is here, by triers of the facts who are in disagreement as to the facts.

It seems to me that fundamental fairness requires a reversal for this reason alone.

II.

I cannot start with the conclusions of the majority that "In general, Sullivan's statements at the second trial varied violently from those he delivered at the first" and that "Then, in effect, he stated all of the murder defendants, for one reason or another, were totally incapable of understanding the serious consequences of their confessional act, and that their physical and mental conditions were such as to negative the voluntariness of their statements." The majority say "in effect" that was Dr. Sullivan's testimony. I see no room in a perjury case to talk vaguely about atmospheric "effects". Perjury must be found in testimony given and by specific reference to it.

It is necessary to set forth some of the background.

On February 10, 1948, Dr. Sullivan was requested by the prosecutor to appear at police headquarters, without any intimation as to the purpose. When he arrived he was asked to witness the execution of statements by five of the six murder defendants, and two days later was present when the sixth defendant signed his. This was a new experience for Dr. Sullivan. Dr. Corio was similarly called without prior explanation and he too found himself in a new situation. Neither doctor came prepared to make a medical examination. Dr. Sullivan apparently had no equipment at all. Dr. Corio had a stethoscope. Neither had a blood pressure gauge.

Dr. Corio testified that he thought he was (a) to examine for evidence of physical brutality and (b) to see that no physical force was used at the time the confessions were signed. His examination was limited accordingly and *he made no notes whatever.* This was in February 1948, eight years before the trial of the charges against Dr. Sullivan. In short, Dr. Corio thought his role was that of a layman. The doctors made separate physical examinations and Dr. Corio testified he did not hear much of Dr. Sullivan's interrogation of the men. Nor were the police officers in a position to hear all of Dr. Sullivan's interrogation of the men during his physical examination of them. The doctors compared their findings, but it is plain to me that they talked only of physical rather than emotional conditions. Later Dr. Sullivan gave a sworn statement to the police on oral interrogation. This is the statement which looms so large in the majority opinion. Dr. Sullivan answered all questions put to him. They related solely to the absence of signs of physical injury and to the disavowal by the accused of force or deprivation as to physical wants. No questions were addressed to the emotional picture. The mere failure of Dr. Sullivan to volunteer information not embraced in the questions put cannot be elevated to the status of testimony affirmatively inconsistent with testimoney later given.

At the first trial, Dr. Sullivan was used by the State as a pure fact witness with no reference to professional skill. On cross-examination, the approach was essentially the same, except for the development hypothetically of some testimony given by Dr. Sullivan on direct that he asked Cooper if he used "reefers" because he observed signs suggesting that Cooper might have, and the total effect of that examination was that a drug *could* have produced what Dr. Sullivan observed. The truthfulness of that testimony cannot be challenged, and the majority agree.

In reversing the convictions at the first trial, this court adverted to the subject of psychological coercion, which

had been projected into the forefront by opinions of the United States Supreme Court which came down just prior to the opinion of this court. On the second trial, the State again offered Dr. Sullivan as a fact witness, no different from a lay observer. But the defense then branched into a new thesis, psychological compulsion. The majority opinion states that Dr. Sullivan was offered refuge by the trial judge who suggested he might refuse to answer questions calling for opinions. I read the record precisely the other way.

The cross-examination of Dr. Sullivan was fantastic. On direct he repeated the testimony as to Cooper which suggested the possibility that marijuana had been used. Since Dr. Sullivan was a physician, the trial judge properly permitted some cross-examination along the line whether what he observed was consistent with the use of the narcotic, and of course the answer was in the affirmative. Then followed an amazing performance, wholly beyond the direct examination. Dr. Sullivan was querried hypothetically as to the effects of various drugs, etc. and what could conceivably cause this, that, or the other, without any foundation in the direct examination. That course having been permitted by the trial judge over the State's objection, defense attorneys worked in relays upon the witness, traversing the course time and again, and propounding one hypothesis upon another. A direct examination of 15 printed pages was followed by 298 printed pages of further interrogation.

Dr. Sullivan dutifully answered myriads of questions as to whether A *could* cause B, giving what seems to have been the only conceivable answer, to wit, that A *could* cause B. Although of course Dr. Sullivan did not author the questions, and could answer only in terms of *possibilities* any question which was so framed, yet the trial court chided him because he did not answer in terms of *probabilities*. The prosecutor on redirect appeared also to seek answers in terms of probabilities when manifestly the witness

could not answer in those terms without assuming facts not within his personal knowledge. Thus when the prosecutor returned to the subject of Cooper and marijuana, and Dr. Sullivan repeated that what he observed could have been caused by the narcotic but that he could not say that it was, the trial court said to the witness "you are professionally trained," "You are a trained man," and for the third time admonished him:

> "Wait a minute. Let me finish. What was the condition that you found Ralph Cooper, or any of these defendants in when you examined them? I don't want possibilities, because anything relating to human affairs may be possible. I want reasonable probabilities, and you ought to be able to tell me what you found."

The prosecutor pressed the inquiry for some 25 additional pages and finally obtained the answer he here charged to be perjurious, "I say it could have been—it was caused by marijuana."

In short, although offered as a pure fact witness, Dr. Sullivan was converted into an expert and asked to express opinions which manifestly could not rest solely upon his own factual observations. He thus was called upon either to guess or to use factual information acquired from other sources. Hence, when asked at the second trial to explain why he had not testified to certain views at the first trial, he answered that no one had put the questions, and that whereas he then testified to factual observations, he was now asked to give opinions and diagnoses.

Despite the fact that the trial court found falsity only in medical opinions, the State argues before us that there was falsity as to factual observations. The claim boils down to this: At the first trial, Dr. Sullivan said Forrest was "moderately excited" (he said he used it as a medical term, between "slightly excited" and "maniacally excited", and hence without reference to such nervousness or

excitement as one would ordinarily accept as normal under the circumstances), and in response to whether he had told counsel at a prefrial interview that Thorpe was nervous, said he recalled making that statement only about Forrest. He said English talked "very freely", but he would not say he was surprised at how freely he talked. As to MacKenzie, he said "normal is relative. I'd say as far as my observation of normality he was normal" and "I can't recall him being nervous."

It may be said that in such matters Dr. Sullivan's testimony departed on cross-examination at the second trial. But if so, which testimony was true? And if the majority find perjury therein (and I am not sure they do), then the error in refusing to admit the testimony of the unavailable witnesses, Manning and Police Captain Delate, is manifestly prejudicial. For example, Manning testified that he observed all of the men to be "highly nervous."

Apart from the fact that Dr. Sullivan's testimony at the first trial was brief and he used "moderately excited" as a recognizable medical state rather than as a lay expression, a number of circumstances will explain a departure, if there was one, in terms other than perjury. We may fairly assume that the men signing their death warrants were not as placid as guests at a tea party. It would be remarkable if there was no sway from "normal" emotional balance. Moreover, Dr. Sullivan had not known these men prior to February 1948, but thereafter treated some of them in his capacity of jail physician and thus could contrast what he observed in February 1948 with their relatively normal demeanor thereafter. Still further Dr. Sullivan may well have reappraised his initial observations in the light of facts later revealed to him. For example, he had not been informed on February 10, 1948 or prior to the first trial of these undisputed facts: that a few hours before Forrest signed his confession he had a severe emotional episode which included hallucinations; that Dr. Moore was summoned and left sodium amytol for the prisoner with

advice to Detective Naples that it would influence Forrest's thinking for 3 to 6 hours; that nonetheless the confession was started 15 minutes thereafter. He later learned of the claim of MacKenzie that shortly before the confession he smoked cigarettes received from a turnkey, had a lapse of consciousness and recalled nothing until two days later, when, it seems undisputed, he became so violent that he was placed in a padded cell. To this Dr. Sullivan could add a strange and undisputed performance he had witnessed on February 10, 1948, when Thorpe denied his guilt, and yet after cautionary words from Dr. Sullivan and a firm statement by the prosecutor that there were no promises, he nonetheless signed the confession, saying he would be out in a few days. Wilson had vigorously denied complicity and signed a statement to that effect, despite the accusations of the other prisoners. In the light of these circumstances and the flurry of charges which followed the first trial, it would not be strange for Dr. Sullivan to canvass his recollection and give significance to what had not initially seemed to be of moment.

At any rate, since the falsity was found to reside in medical opinions, I will turn to them.

I gather the heart of the majority finding with respect to the testimony concerning English related to Dr. Sullivan's opinion that English had a psychoneurosis.

Both Dr. Sullivan and Dr. Corio found that English suffered from a serious heart condition, which in fact resulted in several attacks during the trials and his death after the second trial. On cross in the second trial, defense counsel developed the theme that one who knew he suffered from so severe a heart condition *could* yield to persistent pressure for fear of a fatal attack, a thesis which, as far as the record goes, must be accepted as tenable. Ultimately Dr. Sullivan gave his opinion that English had a psychoneurosis.

Now who says Dr. Sullivan's opinion was falsely held by him or, for that matter, that English was not psycho-

neurotic? He had never testified otherwise and no one so much as offered a contrary opinion. Dr. Corio's testimony is not all enlightening. He was interested in bumps and bruises and nothing else. He had made no notes. Confronted with prior testimony, he repeatedly accepted it because it was in the record. He protested understandably "Counsellor, this is eight years ago." He disclaimed knowledge in the field of psychiatry and could not name a single treatise in the field. He acknowledged he had not heard all of Dr. Sullivan's interrogation of the men and, as pointed out above, the police officers heard even less, if they heard any of it. Dr. Corio conceded that a psychoneurosis could accompany English's heart condition. He later added (with reference to his own observations of MacKenzie):

> "I think Doctor Sullivan will agree with me that the most individualistic person in the world is an M.D. He doesn't like to depend on another doctor for his opinion or ideas.

> "Q. By that you mean that— A. We are trained that way.

> "Q. You are trained that way, and by that you mean that one doctor will see one thing in a patient and you see— A. Yes, sir.

> "Q. (continuing)—or another doctor will see something entirely different in a patient? A. That is right."

Thus there was utterly no proof of the falsity of Dr. Sullivan's testimony. And to demonstrate the danger of a judicial conclusion from the record before us that (a) English did not have a psychoneurosis and (b) Dr. Sullivan did not truthfully hold that opinion, I will go beyond the record before us and refer to expert testimony in the second murder trial.

The defense there produced a prominent psychiatrist, Dr. Frederic Wertham, who on the basis of a hypothetical question expressed the opinion that English did not sign the confession of his own free will and did not understand the consequences of signing it. I might add that Police Lieutenant Dawson (not produced by the State at the present trial) testified that English gave three different stories which he rejected as "fantastic"; that at first English was very cooperative and did not seem nervous but "as the talking progressed and he gave us the three stories he became a little emotional and began to sweat". The State countered with a noted man in the field, Dr. James B. Spradley, who thought English to be mentally competent. But as to whether English was psychoneurotic, the State's own expert, after explaining that psychoneurosis is a big word which includes "those little peculiarities which all of us display from time to time", testified,

> "Yes, I think the man is psychoneurotic."
>
> "Q. Then, in other words, besides the heart trouble he had a psychoneurosis, is that right? A. I think he had a psychoneurosis. That is, he was showing these symptoms of fear and nervousness and so on, which come under the general classification of psychoneurosis, so that to that extent I think the Doctor's labeling of this man as psychoneurotic reaction was all right."

As to the testimony relating to MacKenzie, I pointed out above the paucity of the examination of Dr. Sullivan at the first trial. On cross-examination in the second trial, Dr. Sullivan was led to say that he "might have been nervous. I don't recall stating that but— Q. Was he nervous? A. Yes, I would say he was nervous." Hypothetically it was developed that a drug *could* have caused what he observed. That was as far as the cross-examination went. It will be recalled that the court later admonished Dr. Sullivan to speak in terms of probabilities and the

testimony as to Cooper recited above was given. It was immediately thereafter that the following occurred:

By The Court:

"Q. Now, Doctor, you examined MacKenzie, didn't you? A. Yes, your Honor.

"Q. Can you or can you not tell this Court from that examination as to whether or not he was under the influence of any drug of any form? A. Your Honor, I would say from the symptoms manifested, being relatively nervous, a drug could have been used.

By Mr. Volpe [the prosecutor]:

"Q. (Continuing) Is that speculative or conjectural? A. That is my observation that from the condition at the time that I examined him, being coherent, that is answering and orientated to where he was in answering the questions, yet being highly nervous, it seems that he was being controlled. I mean, that is—"

At that point the prosecutor interrupted and switched to Forrest and Cooper and 24 pages later returned to MacKenzie (the indictment reads as though the following quotation followed immediately after the portion quoted above):

"Q. Now, as to Jack MacKenzie, or John MacKenzie, Doctor, would you repeat what his appearance seemed to you at the time that you saw him on the night of the 12th? A. If I recall, I stated that Jack MacKenzie appeared to be relatively calm, but nervous, that he appeared to be in a controlled state, as if having had a drug. That is to the best of my recollection, and his physical examination was essentially negative other than that.

"Q. Did you ask Jack MacKenzie whether he had taken any drugs? A. I don't recall.

"Q. And if no drugs had been used, what would you say could have brought about that appearance?

"A. I don't know of any other situation that might put a person in a controlled state other than the hypnosis.

"The Court: What does that mean?

"The Witness: There are certain procedures used by psychiatrists or psychologists that can repeat certain situations so long or so often until the person will become relatively dazed and will be led along a certain line of thought as long as that person pushes those questions."

The matter was not further explored. I gather this testimony was given in the absence of the jury. In the presence of the jury, Dr. Sullivan was examined on direct only as to English and Forrest. During the cross-examination, the prosecutor pleaded "surprise" and sought to neutralize the testimony. The examination and argument went on for some 100 pages to no discernible conclusion and without further reference to MacKenzie.

I do not know whether in the present case the trial court or the majority conceived the statement "he appeared to be in a controlled state" to be a factual observation or a medical opinion. To me, it is a medical opinion which would have to be based upon some facts, and for that reason it is unfortunate that he was not questioned further as to the precise underlying factual detail. If the quoted statement should be deemed to be a factual observation, then surely it is a matter calling for a skilled observer with equal opportunity to observe.

The majority say:

"We can find nothing in the record to warrant this testimony, and we must conclude that Sullivan lied as to his opinions."

The burden was not upon Dr. Sullivan to prove a basis for his opinion. Rather the burden was on the State to prove there was none and that Dr. Sullivan's belief in his opinion

was false, and this by two witnesses or one witness supported by strong corroboration.

I find no reliable evidence that Dr. Sullivan did not honestly hold the opinion he gave. Dr. Sullivan had not at any time testified to the contrary, certainly not explicitly so, and if he had, such testimony would not have sufficed to sustain a conviction. The police officers surely were not qualified to express an opinion and moreover it does not appear that they heard all of Dr. Sullivan's interrogation of MacKenzie. All the State can point to is the testimony of Dr. Corio:

"Q. Now, after the signing of this statement what examination, if any, did you and Doctor Sullivan give MacKenzie? A. He was given the same examination as the others, ears, nose and throat, his heart, his lungs, extremities, abdomen, *signs for any external signs of any physical abuse.*

"Q. What did you find, Doctor? A. They were negative, findings were negative.

"Q. Was he oriented? A. Yes, sir.

"Q. Doctor, was there anything which you found in your examination which *indicated to you* John MacKenzie was nervous, that he was moderately excited, that he could have been drugged, that he was in a controlled state and that if he wasn't drugged he could have been in a hypnotic state? A. No, sir. (italics added)

Further:

"Q. That is what I want, Doctor. A. Essentially negative means to me that there is nothing worth mentioning. In other words, there is nothing important enough to mention.

"Q. Essentially negative you mean? A. We are talking about a *physical* examination now, is that right? (italics added)

"Q. Well, I want to know what it means to you in any capacity. A. That is what it means to me."

Still further:

"Q. Were you told specifically what you should do? A. Outside of asking me to examine the men, to see if any signs of any physical abuse were present.

"Q. Anything else said? A. Not to my knowledge, no, sir.

"Q. What did you have in mind? Amplify what you had in mind when you examined Thorpe. What was your purpose? A. Well, as I testified before, there was a two-fold purpose, one was to see that the man had not been abused previous to the signing of the statement, and secondly to see that no abuse was exerted to make him sign this statement from a medical standpoint.

"Q. *That was all you were interested in, those two things?* A. *Yes, sir.*" (italics added).

And it was with specific reference to MacKenzie that Dr. Corio testified that "one doctor will see one thing in a patient" and "another doctor will see something entirely different."

For reasons already expressed, I would discount Dr. Corio's testimony, but if it be granted the largest possible value, to wit, that his professional observations and opinion differed from Dr. Sullivan's, I could no more conclude from that conflict that Dr. Sullivan is a perjurer than I would conclude that the tag should be placed on Dr. Corio.

Nor is it important whether we believe or disbelieve the testimony of Dr. Sullivan. On the record before us I could not say that I would accept his opinion. But the issue in a perjury case is not whether the trier of the facts believes the testimony accords with the ultimate truth. We cannot reach the question of truth until and unless there is testimony by two witnesses or one witness supported by

strong corroboration that Dr. Sullivan did not believe in the opinion he expressed. And I cannot find that evidence on the record.

There is another aspect which gives me deep concern. MacKenzie either was or was not under the influence of a drug. If he was not, then we have the case as it was presented by the State. But if he was, there is nothing to talk about. True, it might still be maintained eruditely that a man may be guilty of perjury in telling the truth if he believed his testimony to be false, but in the circumstances of this case we would hardly let that proposition detain us from other work. The State offered no proof addressed directly to this critical fact, but rather chose to make the trial a battle of opinions. We do not have the question whether the State must produce all available evidence, 14 *Am. Jur., Criminal Law,* § 163, p. 881; 23 *C. J. S., Criminal Law,* § 1017, p. 390; rather the question is whether it may produce no direct proof whatever and ask the court to start with a factual assumption against the defendant to the effect that MacKenzie was not under the influence of a drug.

We know MacKenzie claims to have been drugged and to have had a lapse of consciousness after smoking cigarettes received from a turnkey; and it seems to be agreed that two days later he became so violent he was placed in a padded cell. We know that in spite of his confession he was acquitted by a jury which considered that testimony and the testimony of the officers and others, including Dr. Corio, but apparently not including the questioned testimony of Dr. Sullivan. I refer to the murder trial not because the result of that trial is here evidential either way, 41 *Am. Jur., Perjury,* § 63, p. 36, but rather to show the existence of evidence to the knowledge of the State, and indeed evidence that apparently destroyed the probative effect of the confession. The State did not offer MacKenzie, the turnkey, or others who had custody of MacKenzie.

Should not an inference of fact be drawn in favor of Dr. Sullivan? 1 *Wharton, Criminal Evidence* (12th ed. 1955), § 144, p. 270. In any event, I am not prepared to agree that where a factual issue goes to the heart of the State's case, the prosecution may withhold all known evidence bearing upon it, and thus seek to have the court accept and start with the prosecution's private determination that a drug had not been administered. In this connection, I cannot be oblivious of the fact that sodium amytol was given to Forrest and his statement taken almost immediately thereafter.

This brings us to the element of *mens rea*. The common law concept of crime required the "concurrence of an evil-meaning mind with an evil-doing hand." *Morissette v. United States, supra* (342 U. S. 246, 251). A wrongful act was not enough; it had to be attended by a sense of wrongdoing, a culpable state of mind. Although a criminal mind is not an ingredient of some statutory offenses of a regulatory type, *mens rea* persists as an essential element of statutory crimes borrowed from the common law, at least in the absence of clear legislative expression to the contrary. The minimum *mens rea* is that described above; more is required as to some crimes. We need not consider what sufficed at common law or today suffices in other jurisdictions with respect to perjury. In our state we have two crimes in this area, perjury and false swearing. As to perjury, a high misdemeanor, the statute plainly provides that willfulness, sufficient for false swearing, is not enough for perjury. Rather the perjured testimony must also be given *corruptly*.

"Corruptly" is not easily defined. In the light of our statutes it must be something more than willfulness. It does not require a dollar motivation, but it does connote an intent to obtain an advantage for some one. It imports a vicious or wicked motive. See 9 *Words and Phrases, Corruptly* (Perm. ed. 1940), p. 778; 1 *Burdick, Law of Crime* (1946), § 330b, p. 494.

At the argument before us, the State energetically rejected any suggestion that Dr. Sullivan arranged with defense counsel to commit perjury. The thesis below and here was that Dr. Sullivan testified truthfully at the first trial and on his direct at the second trial, but that when Dr. Sullivan testified that he asked the accused if they were involved in the murder and that he did so because of his interest in justice, defense counsel railed at him, playing up the fact that he and the accused were all Negroes; that thereupon Dr. Sullivan was embarrased or persuaded that he had been used poorly by the State, and hence decided to "throw the case" to preserve his standing within his race. All of this is possible, but the record does not bear it out. The fact is that Dr. Sullivan was pushed into the role of an expert and admonished to speak in terms of probalities as I have related above; that in fact much of what was charged to be perjurious, including the opinions as to Cooper and MacKenzie, came out on the prosecutor's redirect testimony and not on cross-examination. The fact is that Dr. Sullivan resisted efforts of the defense to lead him beyond the views he held. For example, when defense counsel, after vigorous examination which proved fruitful, sought by a sugary approach to get Dr. Sullivan to say that a man could smoke marijuana and believe it to be an ordinary cigarette, Dr. Sullivan testified firmly that in his opinion it was impossible. I have read this record with a willingness to believe that Dr. Sullivan told the truth as he saw it and without any corrupt purpose, however mistaken he might have been. Thus approaching his testimony, I cannot on this dry record find that he testified corruptly.

III.

A.

Dr. Sullivan testified that exhibit D-4 was a record he made at the time of the examinations of the men and that

exhibit D-5 contained extensions thereof made a few days later. Upon objection, they were excluded.

Dr. Sullivan was charged with fabricating his testimony on cross or redirect examination at the trial in 1951. He offered to prove the notations he made in 1948 to meet that charge. I cannot conceive of any rational basis for the rejection of the offer. Nor can I agree with the majority that competent and non-cumulative proof as to a vital matter may be excluded in the exercise of discretion.

The majority add:

> "We think his refusal in this case was warranted by the obvious unreliability of the memoranda which had a marked tendency to vitiate their usefulness."

First, it should be noted that the State did not make that objection below nor did the trial court so find, but rather the State urged that the memoranda could be used only to refresh recollection and this was the sole ground of rejection. The contention that the memoranda are unreliable was made for the first time in the brief of the State before us. I know of no principle under which an appellate court can deny a rudiment of a trial, the right to examination under oath, on the basis of factual assertions in a brief. I had thought that due process of law precluded that course.

And on what grounds do the majority find the memoranda unreliable? First it is observed that D-4 "apparently * * * was not even referred to during the first murder trial." If this is so, it would prove nothing. The majority also say that at the first trial one of the counsel referred to the paper as a prescription blank. D-4 contains Dr. Sullivan's name and address. Whether it is a prescription blank, I cannot tell from the record, but that does not bear upon admissibility. The majority say it contains "some extraneous matter totally unrelated to the issues of the case." Dr. Sullivan said this was so and offered to explain, but was not given an opportunity. The majority discuss

Dr. Sullivan's testimony of safekeeping and conclude "we have only the word of Sullivan, the party in interest, to vouch for these documents." No more is necessary to require the receipt of the exhibits into evidence. We have no right to assume that if the issue tendered to us in the brief had been fought out, the trial court would have concluded the memoranda were not genuine.

Lastly, the majority say there was no harmful error because "Sullivan was permitted to testify from D-4 and D-5 during his trial and their contents, at least to some extent, were entered upon the record." He was not permitted to "testify from D-4 and D-5" in the sense of being permitted to read any entry into the record. Rather he was permitted merely to use the memoranda to refresh his recollection, and we here can see by comparing the answers given with the memoranda as printed in the record that entries in the memoranda were reflected in his testimony. But the trial court had no way of knowing that that was so. Thus the whole force of the offer was lost because the trial court did not have before it two vital exhibits in which Dr. Sullivan claimed to have recorded observations and opinions three years before the alleged fabrication and which bear upon the truthfulness of his testimony.

B.

If the majority found perjury in the factual observations, then the offer of the testimony of Manning and Delate as State's witnesses in the second trial presents a significant question which may not be avoided by saying there was no showing that they were unavailable. The fact of unavailability was accepted by both sides and the trial court. The objection raised was solely the one which the majority decline to consider, and this was the single basis of the trial court's ruling. In fact, earlier in the trial, the prosecutor himself represented that Delate was unavailable adding "I just make that statement for the in-

formation on the record", which I interpret to have been intended to account for the failure to produce a known witness. Had there been the slightest suggestion below that the preliminary proof was desired, obviously it would have been forthcoming.

I will not lengthen this opinion by discussing the issue presented, since as I see this case, we are here concerned with medical opinions and I do not find the required proof of falsity with respect to them.

C.

The remaining issue relates to the exclusion of medical treatises upon which Dr. Sullivan testified he relied in reaching his opinions. I agree with the majority that they should have been received. I cannot agree that there is any room for discretion in that regard. Those treatises are constituent facts, indistinguishable from any other fact which led to Dr. Sullivan's opinion, and surely bore upon the issue of criminal intent.

Nor can I concur with the statement of the majority:

> "Sullivan testified his opinions were premised on certain facts he observed. The diagnoses in the treatises were obviously based on the assumed existence of the same symptoms. If these symptoms were not actually present in the murder defendants, Sullivan's opinions were unwarranted and all the medical treatises in the world could not affirm his honesty."

Here the majority appear to find perjury in the medical opinions upon a subsidiary finding or perjury as to observations. That approach not only departs from the trial court's findings, but in addition, assumes that the full bases of Dr. Sullivan's opinions were spread on the record and that a reference to the treatises would have added nothing. It is more probable that if the offer had been received, there

would have followed a plainer delineation of the bases of the opinions. In the muddled state of this matter, I cannot say that the exclusion was not prejudicial.

For these reasons, I would reverse the judgment as to all counts here under review.

Mr. Justice Heher and Mr. Justice Jacobs have authorized me to state that they join in this opinion.

Appendix B.

SUPREME COURT OF NEW JERSEY

APPEAL DOCKET NO. 2248.

CRIMINAL ACTION.

ON APPEAL.

State of New Jersey,
Plaintiff-Respondent,

v.

J. Minor Sullivan, III,
Defendant-Appellant.

MANDATE ON MODIFICATION.

This cause having been duly argued before this Court by Mr. Harold H. Fisher, counsel for the appellant and Mr. Frank H. Lawton, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of said Superior Court—Law Division be and the same hereby is modified; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 1st day of April, 1957.

JOHN H. GILDEA,
Clerk of the Supreme Court.

FILED April 1, 1957.

John H. Gildea, Clerk.

ORDER OF SUPREME COURT OF NEW JERSEY DENYING REHEARING.

This matter having been duly presented to the Court, and no justice who voted with the majority having moved a reconsideration, it is Ordered that the petition for rehearing is denied.

WITNESS, the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton, this sixth day of May, 1957.

JOHN H. GILDEA,
Clerk.

FILED May 6, 1957.
John H. Gildea, Clerk.